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No. 88-1769

In the

Supreme Court of the United States.

OCTOBER TERM, 1988.

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,
PETITIONER,

v.

VERMONT DEPARTMENT OF PUBLIC SERVICE, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT.

PETITION FOR CERTIORARI.

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May 1, 1989

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Questions Presented.

Whether the Vermont Supreme Court violated the Fourteenth Amendment procedural due process rights of the Petitioner Massachusetts Municipal Wholesale Electric Company (MMWEC) to assert and to prove substantial federal constitutional affirmative defenses as pleaded in its Answer to the Complaint in the underlying action in circumstances in which:

(1) the plaintiff-respondent Vermont Department of Public Service, as a consumer protection agency, sued to invalidate the power sales agreements (PSA) for the purchase of nuclear plant generating capability by a group of Vermont municipalities and Vermont Electrical Cooperatives from MMWEC upon theories (1) that the PSA was *ultra vires* and void as a matter of Vermont state law; (2) that it was violative of certain provisions of the Vermont Constitution; and (3) that it was violative of certain provisions of the United States Constitution;

(2) the defendant-petitioner MMWEC contested the state law theories and pleaded in its Answer the affirmative defenses that a judgment adopting the plaintiff's state law claim (a) would constitute a deprivation of property of MMWEC without due process of law as guaranteed by the Fourteenth Amendment; and (2) would burden and discriminate against MMWEC's activities in interstate commerce in violation of the commerce clause of the United States Constitution, Article I, § 8, clause 3;

(3) the parties presented and argued to the Vermont trial court cross-motions for summary judgment confined to the state law theories since a ruling against the plaintiff Department of Public Service on those grounds would efficiently conclude the litigation without need to resort to the federal constitutional claims and defenses;

(4) the Vermont trial court entered summary judgment in favor of MMWEC upon the state law grounds; and

(5) on appeal, the Supreme Court of Vermont reversed and entered judgment favorable to the Vermont Department of Public Service upon those state law grounds, and then denied MMWEC's motion for consideration of the federal constitutional affirmative defenses still not presented by the parties or addressed by either the state trial or appellate court.

Parties to the Proceedings.

Respondents, Plaintiffs. The respondents below were the following plaintiffs.

1. The Vermont Department of Public Service.
2. The Village of Stowe, Vermont, an intervenor.
3. The Vermont Electric Cooperative, Inc., an original defendant subsequently converting to the position of the plaintiff Department.

Petitioner, Defendant. The Petitioner below was the defendant Massachusetts Municipal Wholesale Electric Company. In the proceedings below, MMWEC was joined by Vermont PSA codefendant participants (1) Village of Ludlow; (2) Village of Lyndonville; (3) Village of Morrisville; (4) Village of Northfield; and (5) Washington Electric Cooperative, Inc.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT.

PETITION FOR CERTIORARI.

Petitioner Massachusetts Municipal Wholesale Electric Company respectfully prays that the Court issue a Writ of Certiorari to review the judgment of the Supreme Court of Vermont entered on September 27, 1988, and concluded by denial of a motion for reargument entered on January 30, 1989.

Opinions Below.

The decision, opinion, and judgment of the Vermont trial court dated November 26, 1986, is not published as an official report. We include it in the Petition Appendix at pages 65a-85a.

The decision, opinion, and order for judgment by the Supreme Court of Vermont are yet unpublished in the Vermont Reports. Their full text appears at pp. 1a-24a of the Petition Appendix.

Jurisdiction.

The Supreme Court of Vermont entered an order for final judgment on September 27, 1988. The petitioner filed a timely motion for reargument. That court entered a denial of the motion on January 30, 1989.

The Court derives jurisdiction of the case from 28 U.S.C. § 1257(3) authorizing *certiorari* jurisdiction, *inter alia*, in controversies decided by the highest court of a state "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . ."

Constitutional Provisions Involved.

This case involves the following constitutional provisions.

United States Constitution Art. 1, § 8, clause 3.

> The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . . .

United States Constitution Amend. 5, final clause ("the takings clause") . . . .;

> nor shall private property [be] taken for public use, without just compensation.

United States Constitution Amend. 14, § 1 . . .;

> nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

Statement of the Case.

1. *MMWEC.*

MMWEC is a joint planning and joint action agency established under Mass. St. 1975, c. 775, as amended, through which municipal electric systems may acquire and finance electric capacity and energy. It is "a public instrumentality and the exercise of [its] powers . . . [is] deemed and held to be the performance of an essential public function." *Id.* § 2. It is empowered "to plan, finance, acquire, construct, improve, purchase, operate, maintain, use, share costs of, own, lease sell, dispose of or otherwise participate in electric power facilities or portions thereof" to meet the power requirements of its members. *Id.*, § 5(p). Pursuant to this authority, MMWEC has developed a bulk power supply system, consisting of ownership interests in various electric power facilities which serve, or are planned to serve, Massachusetts and New England.

Thirty-two Massachusetts municipalities currently participate as members of MMWEC, which is governed by a board of nine directors, two appointed by the Governor of Massachusetts and seven elected by the member municipalities. Member-

ship in MMWEC is voluntary; any Massachusetts city or town having a municipal electric department may become a member upon authorization by majority vote as defined in M.G.L. c. 44, § 1. Mass. St. 1975, c. 775, § 3(a). MMWEC is authorized to contract to sell, and its members and other utilities are authorized to contract to purchase, "all or a portion of capacity and output of one or more specific electric power facilities . . . ." *Id.*, § 6(a).

MMWEC finances its power supply system through the issuance of bonds under its general bond resolution adopted August 26, 1976, and supplemental resolutions (collectively "the bond resolution"). The principal and interest on the bonds are payable solely from, and secured by a prior lien upon and pledge of, the revenues derived by MMWEC from its ownership or operation of all projects for which bonds are issued and other available funds pledged under the bond resolution.

MMWEC's revenues consist primarily of payments received under power sales agreements ("PSA's") between MMWEC and participants in projects for which bonds are issued. A project is a financing acquisition vehicle through which MMWEC obtains ownership interest(s) in specified electric power facilities. Under a PSA, which becomes effective upon execution and delivery of agreements for 100 percent of a project's capability, MMWEC sells and each participant purchases a share of the project's capability, which is defined as "the amounts of electric capacity and energy, if any, which the Project is capable of producing at any particular time . . . ." Each participant is required to pay monthly its share of MMWEC's costs related to the project, including debt service and an additional 10 percent of debt service for deposit to a reserve and contingency fund. The PSA's require payments to be made whether or not the project is completed or operating and notwithstanding any subsequent suspension or interruption of output. The payments are payable solely from each partici-

pant's electric system revenues as an operation expense. Mass. St. 1975, c. 775, § 6(b).

2. *The Power Sales Agreements.*

The PSA's at issue relate to MMWEC's Project No. 6, which consists of a 6.001 percent ownership interest in the Seabrook, New Hampshire nuclear generating plant. Like MMWEC's power sales agreements for other projects, including the Stony Brook Intermediate Project, they are contracts for the purchase and sale of "Project Capability," which is defined in full as follows:

> "Project Capability" means *the amounts of electric capacity and energy, if any, which the Project is capable of producing* at any particular time (including times when the Project is not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses, and shall be determined in accordance with the New England Power Pool Agreement, if any, and otherwise in accordance with Prudent Utility Practice [emphasis supplied].

The PSA's are "life-of-unit" contracts that run for the life of the project or until the bonds are paid off, whichever comes later. In the industry, they are often called "take-or-pay" contracts because they require the project participants, i.e., the utilities purchasing capacity and energy, to make monthly payments covering their respective pro rata shares of principal, interest and expenses without regard to whether, when or how much power they actually receive. In this connection, section 5(d) of the PSA's provides:

> *The participant shall make the payments to be made to MMWEC under this Agreement whether or not the Project or any Facility thereof is undertaken, completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of the Project or any Facility thereof for any reason whatsoever* in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance by MMWEC or any other Participant under this or any other agreement or instrument, the remedy for any non-performance being limited to mandamus, specific performance or other legal or equitable remedy [emphasis supplied].

Contracts for capacity and energy are a principal means by which many New England utilities meet their capacity requirements on a long-term basis. Such contracts — often called "unit" contracts — may be for capacity in and energy from an existing generating unit or in a proposed new unit. In either case, the unit contract entitles the purchaser to a stated percentage of the capacity and energy output, if any, of the unit for a term of years or the life of the unit, and the purchaser ordinarily is required to pay the same stated percentage of both the demand costs (i.e., overhead and capital costs) and energy costs (i.e., operating costs of producing the power, primarily fuel costs) of the unit. Virtually all long-term unit contracts contain a take-or-pay clause requiring the purchaser to pay the demand charges whether or not energy is actually delivered. Thus, if a proposed unit does not become operable, or if an existing unit becomes inoperable, the demand charges must be paid.

Section 3(a) of the PSA's obligates MMWEC, *inter alia*, to exercise "good faith" in accordance with "Prudent Utility Practice" to use "its best efforts: (i) to arrange for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the Project;" (ii) to obtain all necessary permits and regulatory approvals for the project; and (iii) "to issue and sell Bonds to finance" the project.

The PSA's also impose a variety of obligations on the participants, including several designed to ensure that participants will satisfy their payment obligations to MMWEC. These provisions include, *inter alia*: (1) section 5(c) requiring participants to charge rates sufficient to raise adequate revenues to meet their commitments under the PSA's and any other commitments constituting a charge or lien against their revenues, and limiting their payment obligations to revenues and other funds derived from their electric departments or systems; (2) section 12(d) providing, in the case of default by any participant, for pro rata increases in the shares of other participants, and thus in their corresponding obligations under the PSA's, up to an accumulated maximum of 25 percent; and (3) section 18 providing for arbitration of disputes arising under the PSA's and requiring that all payments be made when due notwithstanding the pendency of an arbitration proceeding.

The PSA's by their terms do not create or grant to MMWEC a security interest in any funds or property of the participants. The participants' obligations under the PSA's are treated as operating expenses payable out of their general system revenues. It was, and is, the intention and understanding of MMWEC and the participants that the PSA's do not grant to MMWEC a security interest in the revenues, profits or property of the participants.

In the mid and late 1970's, it was not possible for the smaller utilities (or their joint action agencies) to achieve the benefits accruing under long-term contracts for capacity and energy

from new generating units without simultaneously undertaking a proportionate share of the risks of construction of such units. No utility sponsoring a major new generating unit in the 1970's was prepared to sell a share of the capacity of such unit to any utility which was not also prepared to share in construction and financing risks. In short, the municipal and cooperative electric utilities do not have available to them the option of entering into long-term contracts for capacity and energy without also undertaking a proportionate share of the financing and construction risk of a project.

MMWEC has financed its joint ownership share of the Seabrook nuclear generating project through issuance of tax-exempt revenue bonds. The participants in MMWEC's several projects relating to Seabrook, including Project 6, in turn enter into unit contracts with MMWEC for the purchase of capacity and energy from MMWEC's ownership share of the Seabrook generating unit. As explained in the preceding section, so-called "take-or-pay" contracts require the participants to make the contractualy specified payments to MMWEC even if the underlying generating units are never completed or never operate. The take-or-pay provisions of the PSA's are necessary in order to enable MMWEC to sell its bonds to investors. By virtue of the take-or-pay provisions, the participants undertake their proportionate share of the financing construction risk of the underlying generating units, which is the price they pay for the rights to capacity in and energy from those units provided to them by the contracts.

Unit contracts containing take-or-pay provisions are common for the electric industry generally and in Vermont in particular. For example, Vermont municipal and cooperative utilities obtain power from the Vermont Yankee nuclear generating station pursuant to take-or-pay contracts that require payment obligations to be made regardless of whether the unit was ever completed or ever operated at full capacity. Vermont

utilities obtain power from MMWEC's Stony Brook Phase I Intermediate generating unit pursuant to virtually identical contracts. Vermont municipal and cooperative utilities also have entered into take-or-pay contracts with Public Service Company of New Hampshire for power from its Merrimack Unit No. 2.

3. *Approval of the PSA's by the Vermont Public Service Board.*

In 1965, acting under 30 V.S.A. §§ 202, 203, 206, 209, 217, 2807, and 3039a, the Vermont Public Service Board ("PSB" or the "Board") issued its General Order No. 45, which requires all private, municipal and cooperative electric utilities to give written notice to the PSB ninety (90) days in advance of entering into certain contracts, including, *inter alia,* "any contract for the purchase of capacity in, or energy from, any electrical generating or transmission facility for ultimate consumption within the State of Vermont." The notice must be accompanied by a copy of the proposed contract.

The PSB's opinion in support of the order describes the then anticipated future need for additional electric energy in the state, and finds "that the efficient and economical way to generate and transmit sufficient electrical energy to meet the increasing demand will be through the construction of large-scale facilities for generation and transmission," and "that the plans of electric utilities for new generation and transmission facilities to serve Vermont consumers must be coordinated on a statewide basis . . . ." Noting that 30 V.S.A. § 202 makes it "the responsible planning agency of the state for the purpose of obtaining . . . proper utility service at a minimum cost under efficient and economical management," the PSB ruled that "it is our unavoidable duty to coordinate the planning of electric utilities for new generation and transmission facilities to serve the people of Vermont." It concluded: "If any proposed

commitment appears to neglect desirable economies of scale or the needs of other electric utilities, we shall have an opportunity to counsel modification of the proposed commitment before it is too late to change it."

All the Vermont participants in Project No. 6 followed the procedure mandated by General Order No. 45. Furthermore, in VEC's case, the PSB issued a written opinion in November 1979 analyzing the factors involved, pointing out the dangers, and concluding on balance that participation was appropriate. The PSB also required that its opinion be circulated to all members of the cooperative.

The PSB staff undertook a careful review of the PSA's including the take-or-pay risk (as all parties acknowledged below — Supplemental Printed Case record at 299-301; 765 *et seq.*).[1]

4. *Delays and Cost Overruns in the Construction of the Seabrook Power Plants.*

As of the formation of the Vermont PSA's in 1979, the prime owner (Public Service Company of New Hampshire) estimated the completion dates of the two contemplated nuclear generating plants to be April, 1983 and February, 1985, respectively; and the total cost to be $2.6 billion. In early 1981 the total cost estimate rose to $3.12 billion. As of November, 1982, the estimated plants completion dates became December, 1984, and March, 1987, respectively; and the total cost estimate $5.12 billion. In 1984 the investors and owners found it necessary to terminate construction of the second plant. By early 1985 estimates of the completion date of the remaining plant had lengthened to 1987, and of the total cost to $6 billion.

[1] For specific bond issues to finance Project 6, MMWEC was required to seek and receive the approval of the Massachusetts Department of Public Utilities. It is undisputed that it received issuance approvals in 1981, 1985, and 1987; and a particular denial in 1985.

5. The Present Litigation.

In October of 1985 the Vermont Department of Public Service, as a consumer protection agency, commenced the present action in the Vermont Superior Court against MMWEC and the six Vermont Project 6 participants (the four villages and the two cooperatives). The major theories of its complaint were (1) that all the Vermont participants had lacked authority to join in the PSA's six years earlier and had acted in excess or violation of various state legislation; (2) that the PSA's deprived ratepaying customers of various property rights afforded by the Vermont Constitution; and (3) that the PSA's deprived ratepaying customers of property rights protected by the Due Process Clause of the Fourteenth Amendment. Petition Appendix at 46a-55a.[2]

In answer MMWEC asserted various affirmative defenses, including the claims (1) that the requested invalidation of the PSA's under Vermont state law would deprive it of property in violation of the Due Process Clause of the Fourteenth Amendment (Tenth Defense, Petition Appendix, *infra* at 57a); and (2) that such an invalidation would burden and discriminate against its activities in interstate commerce in violation of the Commerce Clause (Twelfth Defense, Petition Appendix, *infra* at 58a).

Upon the state law theories of *ultra vires* action by the Vermont participants, the parties filed cross motions for summary judgment (Petition Appendix, *infra* at 59a-64a), formed an agreed record, and briefed the state law issues to the Superior Court. The trial court rejected the plaintiff's state law claims and entered summary judgment in favor of the defendant MMWEC (*id.* at 65a-85a). On appeal, the Vermont Supreme

[2] The Complaint extended to additional common law theories never developed in the subsequent litigation below. See Petition Appendix, *infra* at 52a-55a.

Court held the PSA's to be invalid under state law and therefore void *ab initio* (*id.* at 18a, 22a).

The state supreme court reasoned that Vermont statutes did not permit its participants to engage in the purchase of power capability by means of take-or-pay contracts but only in the purchase of actual power supplies; and that participation in such agreements by municipalities and cooperatives without an adequate measure of control in contractual decisionmaking violated the common law prohibition against the delegation of a public corporation's "legislative" authority over its expenditures (*id.* at 6a-22a).

Because the cross motions and arguments confined themselves to the potentially dispositive grounds of state law, the parties and the courts did not address the federal law claims asserted in the pleadings.

By Motion for Reargument MMWEC reasserted that "[i]nvalidating the PSA's on the basis of Vermont law impermissibly burdens interstate commerce and violates the Takings Clause and the Due Process Clause of the United States Constitution" (Petition Appendix at 25a, 27a). The Vermont and Supreme Court then denied the Motion without comment (*id.* at 28a).

Argument.

For the following reasons the Court should grant the writ.

I. The State Court's Preclusion of MMWEC's Federal Constitutional Defenses Constitutes a Violation of Procedural Due Process Guaranteed by the Fourteenth Amendment.

The refusal of the Vermont Supreme Court to entertain MMWEC's affirmative federal constitutional defenses, and its

refusal to permit the Vermont Superior Court to entertain them, denies MMWEC the procedural due process protected by the Fourteenth Amendment. A state court may not prohibit or effectively prevent consideration of federal constitutional claims properly asserted by a state court litigant. *Laurence* v. *State Tax Commission*, 286 U.S. 276, 282 (1932); *Ward* v. *Love County*, 253 U.S. 17, 22 (1920); *Postal Telegraph Cable Co.* v. *Newport*, 247 U.S. 464, 475-476 (1918); and *Enterprise Irrigation District* v. *Farmers' Mutual Canal Co.*, 243 U.S. 157, 164 (1917).

A particularly strong corrollary of this doctrine is that state court rules or practices of pleading and procedure may not function unreasonably or arbitrarily to avoid decision of a proper federal law claim. *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 232-234 (1969) (unreasonable notice requirement); *Parrot* v. *City of Tallahassee*, 381 U.S. 129 (1965) (*per curiam*) (supposedly defective certification of trial court record); *Douglas* v. *Alabama*, 380 U.S. 415, 421-422 (1965) (alleged abandonment of recurrent objection); *N.A.A.C.P.* v. *Alabama*, 377 U.S. 288, 293-302 (1964) (arbitrary state appellate briefing rule forfeiting federal claim argument); *Wright* v. *Georgia*, 373 U.S. 284, 289-291 (1963) (same); *Staub* v. *Baxley*, 355 U.S. 313, 320 (1958) (rejecting state court requirement that federal constitutional challenge to municipal ordinance specify sections rather than provision as a whole); and *Davis* v. *Wecksler*, 263 U.S. 22, 24 (1923) (rejecting state law practice ruling of waiver of federal law defense) (per Holmes, J.: "The state courts may deal with [practice and pleading] as they think proper in local matters but they cannot treat [them] as defeating a plain assertion of federal right. The principle is general and necessary.") The central point has remained that "state procedural requirements which are not strictly or regularly followed" cannot bar consideration of the federal law claim or review of the treatment of that claim by this Court. *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964).

The banishment of the federal law claim in the present instance is especially arbitrary. For in the cited instances the state's highest court typically invoked a technical rule of pleading or procedure as justification. Here the Vermont Supreme Court offers no rationale whatsoever for the ejection of MMWEC's constitutional defenses from the case (Petition Appendix at 28a).

II. The Petitioner's Federal Constitutional Claims are Substantial and Therefore Worthy of Consideration by the State Court System.

MMWEC's affirmative defenses that invalidation of the PSA's under state law would violate (1) its substantive due process property interests, and (2) its right to engage in interstate commerce without discriminatory and burdensome interference have substance and warrant fair consideration by the state courts below.

A. *Invalidation of the Contracts Deprives MMWEC of Property in Violation of the Due Process Clause of the Fourteenth Amendment.*

The decision of the Vermont Supreme Court deprives MMWEC of a substantial property interest without due process of law. The leading decisions of this Court turn such a deprivation upon "the character of the government action, its economic impact, and its interference with reasonable investment-backed expectations." *Prune Yard Shopping Center* v. *Robbins*, 447 U.S. 74, 83 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).[3]

[3] The definition of a deprivation under the Due Process Clause, the Takings Clause of the Fifth Amendment (as incorporated into the Due Process Clause of

The character of the governmental action here supplies scant justification for the disruption of the multilateral, interstate contractual arrangement comprised by the PSA's. The Vermont Supreme Court does not offer any public purpose objective requiring the invalidation of the Agreements and their cumulative reliances, beyond the excusal of the Vermont participants from their financial duties under the contracts (Petition Appendix at 6a-22a). This Court's decisions indicate that the character of the governmental action becomes more acceptable if it is a "public program adjusting the benefits and burdens of economic life to promote the common good," *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978); and less acceptable if it is a measure to compel "some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). *See also Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163 (1980).

The decision of the Vermont Supreme Court falls within the latter category. In substance it simply releases altogether the home town contractual participants from the onerous eventualities of the Seabrook-based PSA's and transfers the detriments of the arrangement to their Massachusetts counterparts. The action is not an adjustment of benefits and burdens in the

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the Fourteenth), and the Contract Clause have converged at the bedrock criteria measuring (1) the vested strength and objectively reasonable expectation characterizing the endangered private property interest; (2) the magnitude of the diminution or deprivation by the government; and (3) the countervailing strength of the governmental purpose. See *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 241 & n.12 (1978); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 14-15 (1977); *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 424, 448 (1934) (per Hughes, C.J.); *Note, The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 98 (1978) (comparing the Takings Clause and the Contract Clause); and *Note, The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 84 (1977) (to the effect that decisional law has assimilated the Contract Clause criteria into the Takings and Due Process standards).

common good, but rather a wholesale desertion of legal and equitable responsibility for partisan benefit. The court offers remarkably little Vermont precedent for its reasoning; substitutes analogies for holdings in its reference to decisions from other jurisdictions; and synthesizes a "non-delegation" doctrine reducing to the proposition that Vermont municipalities may break any contractual commitment in which their participation seems inadequate to protect their financial risk.

The economic impact upon MMWEC and the Massachusetts contractual participants in the Project 6 Seabrook PSA is massive. The Vermont decision divests MMWEC prospectively of 14.9 percent of the contract and exposes it retrospectively to claims of restitution of the 20 percent payments of the Vermont participants over the prior six years (1979-1985) of the contracts, an exposure approximating 6.2 million dollars. These consequences severely undermine the capacity and willingness of the remaining Massachusetts participants to persevere in their contractual obligations, and in ultimate consequence the capacity of MMWEC to survive financially as a privately funded public instrumentality designed to furnish large quantities of electrical power to public consumers at reduced cost.

Finally the Vermont decision interferes drastically with reasonable investment backed expectations of MMWEC, other PSA participants, and the majority of the Vermont participants themselves. The investments were substantial, or in fact open-ended on the part of all contractors; and the expectations of legal validity were completely reasonable. All bond counsel opined favorably. No Vermont statutory or decisional law prohibited the arrangement, as evidenced especially by the paucity of Vermont authority marshalled by its highest court in the decision below. Congruent PSA's were already operating for other projects (the Stony Brook Phase 1 Intermediate generating unit; the Vermont Yankee generating station; and the Merrimack Unit No. 2 plant, all cited above) of Vermont partici-

pants, distinguishable not by any legal feature but only by their better financial results. Indeed, it was undisputed below that the plaintiff Vermont Department of Public Service, in its capacity as an electric wholesaler, had employed take-or-pay contracts with Vermont utilities (Supplemental Printed Case record at 641; 644-645; 655-656). Finally, and most telling, the Vermont Public Service Board as *parens patriae* approved the Project 6 PSA in 1979 in accordance with its General Order No. 45, a particular assurance to MMWEC and the Massachusetts participants from the agency specifically designed to protect the interests of the Vermont participants.[4]

In short, all three indicia of a due process deprivation are visible in the present case. They warrant, at a minimum, a fair opportunity for adjudication in the Vermont courts.

B. *Invalidation of the Contracts Burdens and Discriminates Against MMWEC's Activities in Interstate Commerce.*

Discriminatorily protectionist state action violates the Commerce Clause. *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 335, 339 (1982) (state commission indicated that its order was "designed to gain an economic advantage for New Hampshire citizens at the expense of . . . customers in neighboring states"); *Raymond Motor Transport, Inc.* v. *Rice*, 434 U.S. 429, 446-447 (1978) (discriminatory state regulation satisfying in-state constituency pressures); *American Trucking Association, Inc.* v. *Scheiner*, 107 S.Ct. 2829, 2840 (1987) (facially neutral axle tax imposed a heavier burden on out-of-state businesses and, in effect, placed a financial barrier at the state borders); *Middle S. Energy, Inc.* v. *Arkansas Public Service Commission*, 772 F.2d 404, 416-417 (8th Cir. 1985),

[4] This safety mechanism, in particular, generated reasonable reliance as the functional equivalent of a declaratory judgment. Again, no legal term of the PSA's varied between 1979 and 1985; only the business consequences of the contractual investment.

cert. denied, 474 U.S. 1102 (1986) (state's real concern was the adverse economic impact of interstate energy agreements on Arkansas, as evidenced in various hearings; state may not constitutionally close its borders to importation of electricity); and *Tri-State Generation and Transmission Association* v. *Public Service Commission of Wyoming*, 412 F.2d 115, 119 (10th Cir. 1969), *cert. denied*, 397 U.S. 1043 (1970) (holding that a state commission's directives effectively preventing Wyoming utilities from paying their contract obligation to an interstate supplier constituted an impermissibly severe impact on interstate commerce).

The *New England Power* and *Middle S* decisions present features similar to those of the present case. In the former, the New England Power Company was a New Hampshire based generator and transmitter of wholesale electricity supplying mainly Massachusetts and Rhode Island customers and servicing less than six percent of the New Hampshire population. A state statute prohibited the exportation of electrical energy without approval of the New Hampshire Public Utilities Commission; and authorized the Commission to withhold approval if it determined that the public could reasonably require use of the energy within the state. *Id.* at 335. This Court concluded that the export ban comprised "precisely the sort of protectionist regulation that the Commerce Clause declares off limits to the states;" that the Commission's order was "designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states;" and that the order inflicted a "direct and substantial" burden on interstate commerce transactions. *Id.* at 339.

In the *Middle S* case the Arkansas Public Service Commission sought to invalidate contracts executed by the in-state Arkansas Power and Light Company for the purchase of power from, or payment for construction of, an out-of-state power plant. Arkansas Power and Light executed a PSA-type contract

with the owner-builder of the planned nuclear power plant, by which it committed to purchase power yet to be generated; to pay the owner agreed sums in advance for application to its (the owner's) operating expenses even if the plant were not yet generating electrical power; and to have the advances credited to the eventual purchase of actual power. This financing arrangement was "essential" to the construction of the project. 772 F.2d at 406. Arkansas Power and Light then entered a wholesale power sales agreement with an obligation to purchase specified shares of power in the future. *Id.* at 407-408. The state commission predicted that the utility's commitments would result in "dramatic" rate increases, place an "intolerable burden" on customers, and have a "crippling effect" on the local economy. It proposed to invalidate the project contract *ab initio*. The Court of Appeals for the Eighth Circuit affirmed permanent injunctive relief against the state commission and affirmed the underlying finding that the commission's action revealed home-based discriminatory intent and effect, with reliance upon *New England Power*. *Id.*

The parallels between those cases and the present are strong: (1) the removal from the state of high-cost electricity and high-cost payments for future power through invalidation of interstate agreements; (2) the exportation of financial burdens to sister states; and (3) the imposition of financial costs upon the interstate electricity supplier.

So here, by attenuated statutory construction and newly minted common law, the Vermont Supreme Court has expelled the interstate Power Sales Agreements from its borders; extracted the state's municipalities and cooperatives from their financial obligations; transported those obligations in aggravated degree to utilities and consumers a neighboring state; and severely exacerbated the costs and financial exposure of the interstate supplier. The judicial use of state statutory and common law to subvert the purpose of the Commerce Clause is

no more constitutional than the parochial use of a state's legislative and regulatory powers for the same illegitimate end.[5] Here, too, at the least, the Petitioner's Commerce Clause defense is entitled to a fair hearing by the Vermont courts.

Conclusion.

For the foregoing reasons the Massachusetts Municipal Wholesale Electric Company respectfully urges the Court to grant a Writ of Certiorari to the Supreme Court of Vermont to determine whether that court unconstitutionally foreclosed the presentation of the Petitioner's affirmative federal law defenses in the state court proceedings below.

Respectfully submitted,

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May 1, 1989

[5] The Commerce Clause is an affirmative expression of congressional authority. It does not confine itself to the prohibition of state legislation alone, but by language and purpose extends to state action broadly which might unjustifiably obstruct its objective of a national commerce. Thus the Vermont judiciary enjoys no exemption from the Commerce Clause of the kind in which it could seek shelter from the Contract Clause. Contrast *Tidal Oil Company* v. *Flanagan*, 263 U.S. 444, 451 (1924).

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APPENDIX A

SUPREME COURT
FORM NO. 1

VT. SUPREME COURT
FILED IN CLERK'S OFFICE
SEP 27 1988

ENTRY ORDER

SUPREME COURT DOCKET NO. 86-555
April Term, 1987

APPEALED FROM:
Washington Superior Court
Docket No. S412-85WnC

Vermont Department of Public Service

v.

Massachusetts Municipal Wholesale
Electric Co., et al.

In the above entitled cause the Clerk will enter:

The superior court's grant of defendants' motions for summary judgment is reversed and judgment for plaintiffs is entered.

FOR THE COURT:
Frederic W. Allen, Chief Justice
Concurring:

Louis P. Peck, Associate Justice
Albert W. Barney, Chief Justice
(Ret.) Specially Assigned
F. Ray Keyser, Associate Justice
(Ret.) Specially Assigned
Stephen B. Martin, Superior Judge,
Specially Assigned

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 111 State Street, Montpelier, Vermont 05602 of any errors in order that corrections may be made before this opinion goes to press.

86-555

Vermont Department of Public Service

v.

Massachusetts Municipal Wholesale Electric Co., et al.

Supreme Court

On Appeal From
Washington Superior Court

April Term, 1987

John P. Meaker, J.

Jeffrey L. Amestoy, Attorney General, William E. Griffin, Chief Assistant Attorney General, and Michael Marks and Dinah Yessne, Special Assistant Attorneys General, Montpelier, for plaintiff-appellant Department of Public Service

Edward B. French, Jr., David B. Stackpole Law Offices, Stowe, for plaintiff-appellant Village of Stowe

Michael L. Burak and John T. Anderson of Goldstein, Manello, Burak & Gabel, Burlington, for plaintiff-appellant Vermont Electric Cooperative

Parker, Lamb & Ankuda, P.C., Springfield, and Daniel O. Mahoney and Jeffrey F. Jones of Palmer & Dodge, Boston, Massachusetts, for defendant-appellee Massachusetts Municipal Wholesale Electric Co.

Stephen C. Walke, Jr. and Ralph W. Howe, III of Paterson, Walke & Pratt, P.C., Montpelier, for defendants-appellees

Washington Electric Cooperative and Village of Ludlow, Lyndonville, Morrisville and Northfield

Rubin, Rona, Kidney & Myer, Barre, for amicus curiae Vermont Public Interest Research Group, Inc.

McKee, Giuliani & Cleveland, Montpelier, for amicus curiae Vermont League of Cities and Towns

PRESENT: Allen, C.J., Peck, J., and Barney, C.J. (Ret.), Keyser, J. (Ret.) and Martin, Super. J., Specially Assigned

ALLEN, C.J. In 1979, four Vermont municipalities and two electric cooperatives contracted with the Massachusetts Municipal Wholesale Electric Company (MMWEC) for shares of the power generating potential of its Project No. 6. This project consisted of a 6.001 percent ownership interest in two nuclear power plants to be built in Seabrook, New Hampshire. In 1985, the Vermont Department of Public Service (Department) filed a complaint in Washington Superior Court, alleging that the Vermont utilities had violated statutory and common law in executing the contracts with MMWEC. The superior court granted summary judgment for defendants, and this appeal ensued. We reverse and hold that the contracts were void ab initio.

Although the underlying litigation was designated formally as a complex action under the provisions of V.R.C.P. 16.1, only a brief summary of the procedural history is necessary here. The Department filed its complaint, seeking declaratory and injunctive relief, on October 18, 1985. The Village of Stowe intervened shortly thereafter as a plaintiff, and the Vermont Electric Cooperative (VEC), originally a defendant, was denominated a plaintiff after accepting plaintiffs' position. The defendants include MMWEC and the Villages of Ludlow, Lyndonville, Morrisville, and Northfield, as well as the Washington Electric Cooperative (WEC).

MMWEC is a joint planning and action agency, incorporated under the terms of special enabling legislation in Massachusetts, through which municipal electric systems may finance and acquire supplies of electrical power or power sources. Its membership comprises thirty-four Massachusetts municipalities; it is governed by a board of nine directors, two appointed by the Governor and seven elected by the Massachusetts-member municipalities. There is no provision for representation of the Vermont municipalities or cooperatives on the MMWEC Board.

In 1976, MMWEC began development of a bulk power supply system consisting of ownership interests in various existing and planned electric power facilities. Included among the planned facilities were Seabrook nuclear plants No. 1 and No. 2. MMWEC obtained a fractional ownership interest in the two plants and designated this interest as Project No. 6. The contracts at issue here relate to this project.

The basic theory under which the parties operate is as follows: MMWEC finances its construction and other costs by issuing bonds; in return, the participants commit a sufficient portion of their utility revenues to cover MMWEC's monthly debt service on the bonds. To this end, MMWEC and public utilities from several states, including the Vermont participants, executed "power sales agreements" (PSAs) regarding Project No. 6.[1]

Under the agreements, which became effective upon the execution and delivery of PSAs covering 100 percent of the project, participants purchased shares of "project capability." "Project capability" is defined in the PSAs as "the amounts of electric capacity and energy, if any, which the Project is capable of producing at any particular time (including times when

[1] Plaintiff Village of Stowe entered into a collateral agreement with defendant Village of Morrisville, agreeing to assume a portion of Morrisville's Project No. 6 obligation.

the Project is not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses . . ."

Each month, the participants are required to pay their proportional shares of MMWEC's costs relating to the project, including debt service; an additional ten percent of the debt service figure is paid monthly for deposit in a reserve and contingency fund. MMWEC is empowered to fix these monthly payments so as to provide revenues sufficient to meet its obligations. The participants are not required to make payments from any source other than revenues derived from their electric departments or systems, but they are obligated to fix their rates in amounts at least sufficient to meet their obligations under the PSAs. Participants also agree to pay any unrelated debts or amounts which might otherwise constitute a charge or a lien upon their revenues, and, except in certain circumstances, they forego the right to issue any of their own revenue bonds without first providing for the payment of all operating expenses and the monthly payments to MMWEC. Further, the agreements include a so-called "step-up" provision, under which each participant's monthly obligation will increase proportionately to cover MMWEC's costs should any participant default.

The participants must make the scheduled monthly payments to MMWEC without regard to whether the project is completed, operating, or even undertaken. Such provisions are known variously as "take-or-pay" or "hell or high water" because of the unconditional nature of the obligation imposed. Here, the monthly payments are required in their full amounts, even if no electricity is ever produced. Participants do not acquire any ownership interest in the physical plant.

The agreements provide further that MMWEC, acting in good faith and in accordance with the tenets of "Prudent Utility

Practice" (a term defined in the agreements), will use its best efforts to arrange for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the project; obtain all necessary permits and rights; and issue revenue bonds to finance all costs. While the Vermont participants share in the costs and risks of the project, they retain no decision-making power with respect to the incurrence of debt, plant construction, or operation.

In the superior court, the parties filed an extensive stipulation of facts, a procedural stipulation, and subsequent motions and cross-motions for summary judgment. After hearing, the court granted summary judgment in favor of defendants. The judgment was entered pursuant to V.R.C.P. 54(b) on the cross-claims for summary judgment.

Three principal questions are presented on appeal. First, plaintiffs contend that the lower court erred in concluding that the Vermont utilities had statutory authority to enter into contracts that include take-or-pay provisions. Second, we must determine whether the PSAs are void, in any event, because the participants attempted to transfer all decision-making authority with regard to the project to MMWEC, thereby violating the fundamental principle of nondelegation. Finally, plaintiffs maintain that the municipal utilities could not legally incur the financial obligations at issue without obtaining voter approval and that the cooperatives were required to obtain the approval of the Public Service Board.

I.

In concluding that the Vermont participants were authorized to enter into the PSAs, the superior court relied upon 30 V.S.A. § 4002, which provides in part that:

> Any cooperative or municipal electric utility shall have:
>
> . . .

> (2) authority to act in participation with other such utilities in arranging for the purchase of supplies of capacity and energy from other utilities, either within or without the state of Vermont, including purchases from private electric utilities, municipal electric utilities, cooperatives, associations of utilities, or public authorities; . . .

The plain language of this section authorizes Vermont utilities to act jointly in obtaining supplies of electrical capacity and energy. Here, however, the participants in the project are not involved in the ordinary purchase of capacity and energy. Instead, they have obtained shares of "project capability," defined in the agreements as "the amounts of electric capacity and energy, *if any,* which the Project is capable of producing at any particular time. . . ." (emphasis supplied). Section 4002 provides basic joint purchasing authority; it does not follow that municipal and cooperative utilities are free to enter into speculative contracts that impose unconditional, long-term obligations in the face of "if any" disclaimers. The statute authorizes joint purchases of *supplies* of capacity and energy. It is contemplated that these supplies will be ascertainable in amount and that contractual remedies will be available in the event of any deficiencies.

A comparison with the provisions of two other statutes illustrates the limited scope of the plain language in question. 30 V.S.A. § 604(2) provides that, *in addition* to the general powers granted to municipal utilities, Burlington and Lyndonville may enter into utility contracts, "including, without limitation, contracts for the payment of obligations imposed without regard to the operational status of a facility or facilities. . . ." In a clearer grant of take-or-pay contracting authority, Chapter 84 of Title 30 establishes the Vermont Public Power Supply

Authority (VPPSA). Section 5013(a) of that chapter, entitled "Special powers," empowers the VPPSA and utilities to contract on a basis that "may provide for the payment of unconditional obligations imposed without regard to whether a project is undertaken, completed, operable or operating. . . ." In contrast to these express grants of special powers, § 4002 merely authorizes ordinary, joint purchases of supplies of capacity and energy.

Our analysis is buttressed by decisions in other jurisdictions relating to virtually identical contracts. These cases all involve PSAs executed by the Washington Public Power Supply System (WPPSS) and public utilities of several northwestern states. In *Chemical Bank* v. *Washington Public Power Supply System* 99 Wash. 2d 72, 666 P.2d 329 (1983) (*Chemical Bank I*), the Supreme Court of Washington held that statutory authority to purchase "electric current for sale and distribution . . ." did not empower the Washington participants in the PSAs to purchase project capability. *Id.* at , 666 P.2d at 334-35. That court stated:

> [T]he purchase of "project capability" under this agreement is essentially an unconditional guarantee of payments on [WPPSS's] revenue bonds, secured by a pledge of the participants' utility revenues, in exchange for a share of any power generated by these projects. The agreement expressly provides for the possibility that no electricity will be generated and that participant payments will be due even if the project is not completed. The unconditional obligation to pay for no electricity is hardly the purchase of electricity. We hold that an agreement to purchase project capability does not qualify as a purchase of electricity.

Id. at , 666 P.2d 335.

The Washington court later granted a motion to reconsider its decision in *Chemical Bank I* because of the importance of the issues involved and because of the complexity of the statutory issue. After considering several newly raised facts and arguments, the court affirmed its earlier holding. *Chemical Bank* v. *Washington Public Power Supply System,* 102 Wash. 2d 874, , 691 P.2d 524, 537 (1984) (*Chemical Bank II*).

In *Asson* v. *City of Burley,* 105 Idaho 432, 670 P.2d 839 (1983), the Supreme Court of Idaho reached a similar conclusion. Under Idaho statutes, municipalities are authorized to " 'acquire, own, maintain and operate electric power plants, purchase electric power, and provide for distribution to the residents of the city.' " *Id.* at 443, 670 P.2d at 850. The Idaho court reviewed these and other enactments and stated that:

> [W]e can find no statutory authorization for the purchase of "project capability" where such purchase comprehends the payment of long-term indebtedness for which no power may be supplied, and for which no ownership interest is acquired. The municipality is neither acquiring, owning, maintaining, or operating a plant, nor purchasing electrical power. It is underwriting another entity's indebtedness in return for merely the possibility of electricity.

Id.

On the other hand, after reviewing identical PSAs, the Supreme Court of Oregon ruled that Oregon participants had not exceeded their authority in signing the agreements. *DeFazio* v. *Washington Public Power Supply System,* 296 Or. 550, , 679 P.2d 1316, 1345 (1984). The *DeFazio* court observed that "[i]t is not obvious why the legal character of the transac-

tion should differ if the power plants were completed at great cost but produced only a small fraction of the expected electricity rather than none." *Id.* at , 679 P.2d at 1335. This observation obfuscates the true distinction between take-or-pay agreements and other power supply contracts, however. Ordinarily, electrical power contracts are agreements to purchase verifiable supplies of energy, and contractual remedies are available for any shortfalls. It is for the legislature, not the courts, to define limits upon municipal purchasing and financing authority. In any event, *DeFazio* is wholly distinguishable because it was explicitly based on Oregon's constitutional home rule provision, under which a city is free to write its own charter and define for itself what functions and powers, consistent with statutes and the constitution, its agencies will have. *Id.* at , 679 P.2d at 1336.

In *City of Springfield* v. *Washington Public Power Supply System,* 752 F.2d 1423 (9th Cir. 1985), the Ninth Circuit concluded that, under certain circumstances, a contract with take-or-pay provisions could in fact represent a purchase of electricity. The court scrutinized a three-party net billing agreement, also relating to WPPSS. The third party to the agreement was the Bonneville Power Administration (BPA), and the contract included a key provision not present in other cases: while the participants were obligated to pay WPPSS whether or not they actually received power from the project, they either received a refund from the BPA or credit for those payments as against power actually supplied by the BPA. Because the participants received either electricity or a cash refund equal to their payments to WPPSS, the court concluded that the underlying arrangement was in fact a contract for the purchase of electricity. *Id.* at 1429.

We hold that the lower court erred in concluding that 30 V.S.A. § 4002 empowered the Vermont participants to enter into the PSAs. Defendants argue, in the alternative, that certain

other statutory sections contain implicit grants of such contracting power, but we need not consider this contention because we find the PSAs to be void on other grounds.

II.

Under the provisions of the PSAs, all decision-making power with regard to the project rests with MMWEC; the Vermont participants retain no voice in decisions to incur debt, to commence operation of the plant, or to decommission the plant. They have abdicated all management responsibility for and have obtained no ownership interest in the project. Plaintiffs maintain that these provisions constitute an impermissible delegation of authority to MMWEC. We agree.

A.

Our analysis begins with the agreements executed by the municipal participants. This Court has long adhered to the "deep-rooted principle of law that the delegate of power from the sovereign cannot without permission recommit to another agent or agency the trust imposed upon its judgment and discretion." *Thompson* v. *Smith*, 119 Vt. 488, 501, 129 A.2d 638, 647 (1957). In *Wabash Railroad Co.* v. *City of Defiance*, 167 U.S. 88 (1897), the United States Supreme Court stated that "the legislative power vested in municipal bodies is something which cannot be bartered away in such manner as to disable them from the performance of their public functions." *Id.* at 100. In other words, "[w]hen authority to exercise the police power within a defined sphere is delegated by the state to a municipal or other public corporation, the authority is inalienable in the corporation, and it cannot in any manner be contracted away or otherwise granted, delegated, diminished, divided, or limited by the corporation." 6A E. McQuillan, *Municipal Corporations* § 24.41, at 116-17 (3d ed. rev. 1988).

Such authority is in the nature of a public trust conferred upon the legislative body of the corporation for the public benefit, and it cannot be exercised by others. *Arkansas-Missouri Power Co.* v. *City of Kennett*, 78 F.2d 911, 920 (8th Cir. 1935). Therefore, if a public corporation enters into a contract that barters away or otherwise restricts the exercise of its legislative or police powers, then the contract is ultra vires and void ab initio. *Byrd* v. *Martin, Hopkins, Lemon and Carter, P.C.*, 564 F. Supp. 1425, 1428 (W.D. Va. 1983), aff'd, 740 F.2d 961 (4th Cir. 1984); see also *Arkansas-Missouri Power Co.*, 78 F.2d at 922 ("any contract whereby legislative authority or duty is attempted to be delegated by a city is absolutely null and void.") and 6A E. McQuillan, *Municipal Corporations*, at 117 ("contracts . . . which embarrass in any degree the municipal power of regulation of public affairs are ultra vires").

In executing the agreements at issue here, the Vermont municipalities violated the non-delegation doctrine in at least two ways.[2] First, each of the participants attempted to re-delegate one of the most fundamental of its legislative powers: the spending power. Second, the municipalities' agreements regarding other liens on their revenues impermissibly restricted the future exercise of discretion and judgment by their legislative bodies.

"[U]nits of local government cannot by contract or otherwise barter away or surrender their essential legislative or police

[2] The superior court treated this argument summarily, opining that "in view of 30 V.S.A. § 4002(5) this court concludes that there has been no improper delegation of utility management responsibility as a result of the PSAs." Subsection 4002(5) provides only that municipalities and cooperatives have "authority to otherwise do all lawful acts and things necessary or incidental to the exercise of the authority granted in this chapter." The superior court's citation of this provision begs the question of whether the delegations under the PSAs were lawful. Moreover, if such standard, statutory clauses were held to constitute legislative permission, then the "deep-rooted" non-delegation principle would be effectively extirpated from our jurisprudence.

powers, ..." *Byrd,* 564 F. Supp. at 1428; see also *Northwest Natural Gas Co.* v. *City of Portland,* 300 Or. 291, , 711 P.2d 119, 128 (1985) (municipality's power to act for the public's general welfare cannot be bargained away to a public utility). Here, each Vermont participant was presented with an opportunity to obtain — without capital investment — exclusive rights to a percentage of potentially available, inexpensive, electrical energy. But, as part of the substantial consideration required for this bargain, the participants bartered away the ability to exercise judgment and discretion regarding energy costs. "Where the exercise of judgment and discretion and the power to burden the public treasury have been so vested [in the municipality] by the Legislature, they may not be delegated wholesale." *Syrtel Buildings, Inc.* v. *City of Syracuse,* 78 Misc. 2d 780, 358 N.Y.S.2d 627, 630 (N.Y. Sup. 1974).

The express component of the municipalities' attempted delegation of spending authority is found in paragraph 3(a) of the uniform PSAs, which provides that:

> MMWEC, in good faith and in accordance with Prudent Utility Practice, shall . . . use its best efforts: (i) to arrange for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the Project; . . . and (iii) to issue and sell Bonds to finance the Costs of Acquisition and Construction of the Project, and to finance the costs of any necessary renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project. . . .

The purported delegation was made complete by the participants' failure to retain any vestige of control over decisions to incur debt. Under the provisions of the PSAs and the Bond

Resolution, MMWEC has the sole power to establish budgets, revise those budgets, and fix the amount of the participants' monthly payments. Further, the authority to issue bonds resides in MMWEC alone, whether the bonds be for the costs of plant construction, operation, termination, or of "renewals, extraordinary repairs, replacements, modifications, additions and betterments. . . ." In sum, MMWEC makes all decisions to incur, or to refrain from incurring, project debt. Hence, MMWEC is given exclusive control over the magnitude of the participants' monthly payments and over the duration of these payments.

Defendants argue, in effect, that the attempted contractual delegation is permissible because MMWEC has substantial obligations to each of the participants under the PSAs. They note that MMWEC's duties to the Vermont participants are no different than its duties to Massachusetts participants and that MMWEC is obligated to act in accordance with prudent utility practice. This reasoning is flawed because no degree of contractual consideration — even an agreement to assume substantial obligations — can render a municipality's abdication of legislative power permissible. We also note that the Massachusetts participants have elected representatives on MMWEC's board of directors, while the Vermont participants retain no voice whatsoever in the management of the project.

The parameters of permissible redelegation by public corporations can be illustrated by contrasting two cases. In *Arkansas-Missouri Power Co.* v. *City of Kennett,* 78 F.2d 911 (8th Cir. 1935), the Eighth Circuit considered the legality of a municipality's loan agreement with the federal government that would enable the city to construct an electric power plant. Under the terms of the agreement, the federal government obtained a large amount of discretion and control over plans for the plant, labor contracts, and the use of materials. The court stated that:

> The building of an electric light plant obviously requires the exercise of judgment and discretion. . . . The duty to exercise that judgment is imposed upon the council of the city. We think that it may not contract that duty away or share it with others. That does not mean that it may not have plans and specifications prepared by architects and engineers, or that, when such plans have been finally approved by it, it may not let a general contract for the doing of the work and the furnishing of the materials. It does mean that in selling its bonds or otherwise financing the project, it may not delegate to the person who furnishes the money any substantial discretion with respect to the selection of labor or material to be furnished or share with that person the authority to direct and control the construction.

Id. at 922.

Because the federal government had retained "sufficient control . . . to insure that the money furnished would be spent in the way that the government thought it should be spent, whether that was in accord with the ideas of the city council or not," the court held that the city had impermissibly delegated its authority to build the plant. *Id.* at 923.

By way of contrast, the Supreme Court of Washington found no unlawful delegation of legislative or discretionary functions in *Roehl* v. *Public Utility Dist. No. 1*, 43 Wash. 2d 214, , 261 P.2d 92, 105 (1953). There, a consortium of five public utility districts employed an independent consulting engineer to assist them in operating a joint power supply system. In the course of dismissing an argument that the district commissioners had unlawfully delegated their powers, the court noted that the engineer was given no authority to make policy decisions of a legislative character and that he was not free to ignore the

basic policies formulated by the commissioners. Instead, the engineer was to act as a consultant, prepare budgets, perform inventories and valuations, and act as an impartial fact-finder as between the individual districts. Although these duties required the exercise of judgment, the court concluded that they were administrative in character and that no violation of the non-delegation principle had occurred. *Id.* at 106.

The case at hand is closer to *Arkansas-Missouri Power* than it is to *Roehl*. As in the construction of a generating plant, arrangements aimed at ensuring long-term supplies of power require the ongoing exercise of legislative judgment and discretion. This is especially true where, as here, it is contemplated that the attempted arrangements may fail but where long-term financial obligations will be incurred nonetheless. The duty to exercise that judgment and discretion lies with the legislative bodies of the municipalities, and they cannot legally contract this duty away. The authority to spend the municipalities' revenues and the power to limit those expenditures must always be available for use in order that present and future needs may be met. See *Ericksen* v. *City of Sioux Falls*, 14 N.W.2d 89, 95 (S.D. 1944); 6A E. McQuillan, *Municipal Corporations*, at 117.

The participants also violated the non-delegation doctrine by agreeing to restrictions upon their power to make expenditures with regard to other projects or purchases. Paragraph 5(f) of the PSAs provides that:

> The Participant shall not issue bonds, notes or other evidences of indebtedness payable from and secured by a lien on the revenues derived from the ownership or operation of its electric system without providing for the payment of operating expenses (including Monthly Power Costs hereunder) from such revenues ahead of debt service on such bonds, notes or other

> evidences of indebtedness unless an independent consulting engineer . . . certifies that the facilities, for the financing of which the bonds, notes or other evidences of indebtedness are being issued, are . . . reasonably expected to properly and advantageously contribute to the conduct of the business of the electric system of the Participant in an efficient and economical manner consistent with prudent management.

Under an important corollary to the non-delegation principle, a public corporation may not enter into a contract that purports to restrict the future exercise of its legislative authority. See *Byrd,* 564 F. Supp. at 1428-29; *Illinois Power & Light Corp.*, 11 F. Supp. 874, 885 (E.D. Ill. 1935), rev'd on other grds., 89 F.2d 985 (7th Cir. 1937); *Barton* v. *Atkinson,* 228 Ga. 733, 744, 187 S.E.2d 835, 843 (1972); and *City of Louisville* v. *Fiscal Court of Jefferson County,* 623 S.W.2d 219, 224 (Ky. 1981); cf. *Pierce Oil Corp.* v. *City of Hope,* 248 U.S. 498, 501 (1919) (where public welfare is involved, a contract not to legislate would have no effect). By agreeing to the contractual provisions above, the participants have fettered the future exercise of the authority granted to them under the provisions of 24 V.S.A. § 1822 and other municipal utility financing statutes. In the not-unlikely event that a participant should wish to commit a portion of its revenues to acquire energy supplies or facilities in the future, it would have to either: (1) give priority to the monthly payment to MMWEC, or (2) obtain the certification of an independent engineering consultant regarding the advisability of the acquisition. The first option would hinder any prospective financial arrangement because of MMWEC's priority, and either option would deny the free exercise of legislative discretion.

The assignment of proprietary functions, such as plant operation, to MMWEC may be permissible, but the effective

transfer of the municipalities' spending power and the restrictions upon their ability to incur other debts constitute impermissible attempts to redelegate legislative authority.[3] Therefore, the municipalities' execution of the PSAs was ultra vires, and these contracts were void ab initio.

B.

We next consider the enforceability of the PSAs executed by the electric cooperatives, VEC and WEC. The non-delegation principle outlined in the foregoing discussion applies to municipalities and "other public corporation[s]." 6A E. McQuillan, *Municipal Corporations*, at ¦16. Although electric cooperatives are not public corporations in the technical sense of that term, we hold that their agreements with MMWEC are void nonetheless.

"[S]trictly speaking, a public corporation is one that is created for political purposes with political powers to be exercised for purposes connected with the public good in the administration of civil government." 1 *Fletcher Cyclopedia of Corporations*, § 58, at 579 (Rev. ed. 1983). In contrast, "quasi-public corporations" are private corporations to which the state has granted a secondary franchise involving the performance of public duties. *Id.* § 63, at 600. Investor-owned public service corporations organized for profit, including gas and light companies, are deemed to be quasi-public corporations. *Id.* at 602.

[3] We note that 30 V.S.A. § 605 authorizes the Village of Lyndonville to enter into utility contracts containing provisions for "arbitration, delegation and other matters deemed necessary or desirable to carry out their purposes." This language cannot be characterized as legislative permission to delegate the spending power, however, even assuming that such permission would be effective. It appears to refer only to delegation of tasks to third parties. Legislative permission to re-delegate granted authority must be specific: "'"'A legislative power granted to a municipal corporation cannot be parted with unless such was the clear intent of the legislature, ... The authority to surrender the power must appear from "the clear letter of the law."'" *Arkansas-Missouri Power Co.*, 78 F.2d at 921 (quoting *National Water Works Co. of New York v. Kansas City*, 20 Mo. App. 237, 242, S.W. , (1886)).

The corporate structures of VEC and WEC comport with neither of the above definitions and fall somewhere between the classifications "public" and "quasi-public." These cooperatives were not created under the Vermont Business Corporation Act; instead, they were organized pursuant to Chapter 81 of Title 30, under which the power to provide electrical energy is the primary franchise granted by the state. They are non-profit, non-stock corporations created for a single, governmental purpose: the provision of electrical energy to rural areas. Significantly, Chapter 81 and its statutory predecessors allowed cooperatives to adopt a role formerly held by a state agency, known as the Board of Rural Electrification, which had similar powers. See An Act to Promote Rural Electrification, No. 116, 1943 Vt. Laws 161.

The cooperatives' membership requirement distinguishes them from purely public corporations, but this characteristic is simply an organizational device made necessary by the lack of a municipal structure. "It is contemplated in both [municipal corporations and cooperatives] that all the inhabitants in the described territory shall be eligible to obtain the service by complying with the reasonable conditions." *Bookhart* v. *Central Electric Power Cooperative,* 65 S.E.2d 781, 786 (S.C. 1951) (citing *State ex. rel. Wood* v. *Consumers' Gas Trust Co.,* 157 Ind. 345, 352, 61 N.E. 674, (1901). Here, although VEC and WEC provide electricity to members only, their by-laws provide that "any person" may become a member, and, in effect, such membership depends only upon an agreement to purchase electricity from the cooperative.

The courts have disagreed on the extent to which electric cooperatives can be characterized as public or governmental in nature. Cf. *Bookhart,* 65 S.E.2d at 786 (legislature plainly intended to make electric cooperatives public corporations rather than private) with *City of Paris* v. *Federal Power Commission,* 399 F.2d 983, 986 (D.C. Cir. 1968) (electric coopera-

tives not governmental instrumentalities). Even on the question of whether such cooperatives are public utilities, there is a split in authority: most cases on that question are concerned with the jurisdiction of the respective state regulatory commissions, see, e.g., *Garkane Power Co., Inc.* v. *Public Service Commission*, 98 Utah 466, 100 P.2d 571 (1940), or the power of eminent domain, see, e.g., *Dairyland Power Cooperative* v. *Brennan*, 248 Minn. 556, 82 N.W.2d 56 (1957). Those questions are not before us here, but we observe that VEC and WEC are subject to supervision and regulation by the Public Service Board, 30 V.S.A. § 2(a)(12), and that both have the power of eminent domain, *id.* at § 3002(15). We note that the contracting powers of public utilities are constrained by state authority: "A public utility has the right to enter into a private contract but the state can modify that contract when it falls outside the parameters of an appropriate standard." *Afton Energy, Inc.* v. *Idaho Power Company*, 111 Idaho 925, 929, 729 P.2d 400, 404 (1986).

It is at least arguable that the non-delegation doctrine prohibits even quasi-public corporations from re-delegating powers granted to them in connection with their secondary, public service franchises. One court has applied the non-delegation doctrine in a case involving several public utility districts — which are analogous to cooperatives in many respects — after designating them as quasi-municipal corporations. See *Roehl*, 43 Wash. 2d at , 261 P.2d at 105-06; see also *Conley* v. *Union County Peoples' Utility Dist.*, 182 Or. 565, 187 P.2d 150 (1947) (invoking non-delegation principle to invalidate agreement between public utility district and electric cooperative).

We need not debate this question further, however, nor resolve the underlying definitional problem, because even private corporations have certain limitations upon their power to delegate authority. The state grants corporate power to private

entities upon the assumption that the powers will be exercised by the corporation's elected officers and not by the officers of another corporation. *Sherman & Ellis* v. *Indiana Mutual Casualty Co.*, 41 F.2d 588, 591 (7th Cir. 1930). Under the well-settled rule, " '[c]ontracts are ordinarily void . . . which have the effect of withdrawing from the directors the control and direction of corporate affairs, business and management, which is vested in them by law . . . and an agreement by which the . . . directors . . . abdicate or bargain away in advance the judgment which the law contemplates they shall exercise over the affairs of the corporation is void.' " *Milton Frank Allen Publications, Inc.* v. *Georgia Assoc. of Petroleum Retailers, Inc.*, 224 Ga. 518, 528, 162 S.E.2d 724, 730 (1968).

Although this precept echoes, to a degree, the elements of the non-delegation principle, it is not based upon considerations of sovereignty. Instead, the rule springs from the fiduciary relationship between the corporate directors and the shareholders: "Directors of a corporation are regarded as fiduciaries and are required to exercise their own independent judgment for the highest welfare of the corporation and its stockholders." *Stoneham* v. *Fox Film Corp.*, 295 Mass. 419, 425, 4 N.E.2d 63, 66 (1936). It is true that the courts have been flexible in allowing delegation of authority by boards of directors where necessary or expedient. *Boston Athletic Ass'n* v. *International Marathons, Inc.*, 392 Mass. 356, 365, 467 N.E.2d 58, 63 (1984). Yet, at a minimum, there are certain powers and duties that cannot be delegated indefinitely to outsiders. *Sherman & Ellis*, 41 F.2d at 590.

With respect to electric cooperatives, we believe that one of these inalienable powers is the spending authority. Too broad a delegation of power, either express or implied, becomes an unlawful abdication of management functions by the board of directors. *Fournier* v. *Fournier*, 479 A.2d 708, 712 (R.I. 1984). In the instant case, the attempted transfer of essen-

tially unlimited spending authority would have accomplished this degree of delegation. 30 V.S.A. § 3013 dictates that "[t]he business of a cooperative shall be managed by a board of not less than five trustees. . . ." But, when VEC and WEC executed the PSAs, they effectively transferred to MMWEC the unlimited power to determine a substantial portion of their monthly costs for a protracted and interminable period of time. Moreover, the cooperatives also agreed to restrictions upon their future power to issue bonds, and other evidences of indebtedness, secured by liens on their revenues. Because these agreements would have operated to restrict the freedom of the trustees to manage corporate affairs, they are illegal and void. See *Triggs* v. *Triggs*, 46 N.Y.2d 305, 309, 385 N.E.2d 1254, 1255 (1978). We hold that, whether VEC and WEC are treated as public or private corporations, the execution of the PSAs at issue here was beyond their powers.

III.

Our resolution of this appeal on delegation grounds renders consideration of plaintiffs' arguments regarding municipal and cooperative indebtedness unnecessary. Woven through the contentions of defendants and amicus, however, is a recurring theme that requires some comment. Defendants and the Vermont League of Cities and Towns urge that the practical and legal consequences of a decision voiding the PSAs should be considered by this Court. First, defendants maintain that the Supreme Court of Washington's decision in *Chemical Bank*, 666 P.2d at 335, voiding similar contracts between utilities and WPPSS, has created serious doubts about municipal borrowing authority, generated frequent test cases, and produced bizarre rulings by the lower courts. Second, defendants point out that the Washington municipalities that were released from the WPPSS contracts are now defending massive securities

fraud lawsuits. We are no more influenced by these considerations that we are by plaintiffs' emphasis on the immensity of the financial burden imposed by the agreements or by the fact that no power has yet been produced — and may never be produced — by the project. Our Courts are courts of law and will deal with the legal ramifications resulting from our holding; policy considerations are for the legislature.

IV.

Finally, defendants point out that they raised the affirmative defenses of estoppel, res judicata, and fundamental fairness in the court below and that these issues were not ruled upon as part of the summary judgment. Hence, they maintain, this Court should remand the case to the superior court for further proceedings. Our holding that the PSAs are ultra vires and void ab initio obviates any such necessity.

Contracts that are ultra vires "are wholly void and not merely voidable; . . . the corporation is under a perpetual disability to make them . . . cannot be estopped from making the defense of ultra vires. . . ." *Metropolitan Stock Exchange* v. *Lyndonville National Bank*, 76 Vt. 303, 308, 57 A. 101, (1904); see also *California Pacific Bank* v. *Small Business Administration*, 557 F.2d 218, 223 (9th Cir. 1977) (party cannot be estopped from raising defense of illegality in a contract action, and the court is duty bound to raise the issue sua sponte). "'The non-enforcement of illegal contracts is a matter of common public interest, and a party to such contract cannot waive his right to set up the defense of illegality in an action thereon by the other party . . . . Validity cannot be given to an illegal contract through any principle of estoppel.'" *Sherwood & Roberts-Yakima, Inc.* v. *Leach*, 67 Wash. 2d 630, , 409 P.2d 160, 165 (1965) (quoting *Reed* v. *Johnson*, 27 Wash. 42, 55, 67 P. 381, 386 (1901)). We believe that this is equally

true of arguments regarding the kindred doctrine of res judiciata. This doctrine is not derived from statutory or common law; it is merely a "judicial reflection of public policy favoring one fair trial *on the merits* . . . as an expedient in the administration of public justice." *In re Skyline Lumber Co., Inc.* 311 F. Supp. 112, 115 (W.D. Va. 1970) (emphasis in original). The PSAs at issue here were void ab initio, and the invocation of judicial or equitable doctrines cannot now breathe life into them.

The superior court's grant of defendants' motions for summary judgment is reversed and judgment for plaintiffs is entered.

FOR THE COURT:

/s/ _____
Federic W. Allen
Chief Justice

APPENDIX B

IN THE SUPREME COURT
OF THE
STATE OF VERMONT

VERMONT DEPARTMENT OF PUBLIC SERVICE, VILLAGE OF STOWE; and VERMONT ELECTRIC COOPERATIVE, INC.,
Plaintiff-Appellants,

v.

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY; VILLAGE OF LUDLOW; VILLAGE OF LYNDONVILLE; VILLAGE OF MORRISVILLE; and VILLAGE OF NORTHFIELD,
Defendant-Appellees.

SUPREME COURT
DOCKET NO. 86-555

MOTION FOR REARGUMENT

Massachusetts Municipal Wholesale Electric Company ("MMWEC") moves pursuant to V.R.A.P. 40 for reargument to address issues that were either misapprehended or overlooked entirely in the Court's opinion entered September 27, 1988. As grounds for this motion MMWEC states that the issues involved in this case are vitally important to all municipalities and public and private corporations in Vermont, as well as to MMWEC; that the ramifications of the Court's decision are far reaching and potentially calamitous; and that,

in failing adequately to address both the legal issues in the case and the practical implications of its decision, the Court has created uncertainty as to the law of Vermont and as to the validity of many existing contracts involving Vermont entities. The Court overlooked or misapprehended the following points of law presented in the original briefs, each of which would affect the result reached by the Court (and each of which is developed in more detail in the memorandum filed herewith):

1. Under 30 V.S.A. § 4002 municipalities and cooperatives are expressly authorized to purchase not just "energy," which is the actual output of an electric plant, but also "capacity," the plant's electric generating potential. The Court's opinion fails to give any weight whatsoever to the statutory authorization to purchase "capacity," or to recognize that what § 4002 authorizes is *precisely* what the PSA's provide, *i.e.*, the purchase of "capacity and energy."

2. The Washington Supreme Court opinion, *Chemical Bank* v. *Washington Public Power Supply System*, 99 Wash. 2d 772, 666 P.2d 329 (1983) aff'd en banc 102 Wash. 2d 874, 691 P.2d 524 (1984), *cert. denied*, 105 S. Ct. (1985), and the Supreme Court of Idaho opinion, *Asson* v. *City of Burley*, 109 Idaho 432, 670 P.2d 839 (1983), were based on state statutes which did not expressly authorize contracts for capacity, unlike 30 V.S.A. § 4002.

3. If there is *any* statutory authority for the municipalities and cooperatives to enter into PSAs then, by definition, the utilities have permissibly delegated their authority. Inexplicably, the Court refused to consider several of the statutory provisions that empower the Vermont participants to enter into the PSAs. Because there is statutory authority, the non-delegation doctrine is inapplicable.

4. The Court cited Lyndonville's express authority under 30 V.S.A. § 604 to enter into take-or-pay contracts, but inexplicably failed to uphold Lyndonville's PSA. The Court does

not have the authority to ignore, or implicitly "repeal," explicit legislative enactments.

5. Sections 3(a) and 5(f) of the PSAs involve relatively minor delegations of municipal authority when compared to the delegations of municipal powers in the cases cited by the Court. The Court's decision gives no recognition to the broader scope of delegation permitted with respect to proprietary as opposed to governmental functions.

6. Although based almost entirely on precedent from other jurisdictions, the Court's discussion of the non-delegation doctrine is inconsistent with the clear trend in the case law around the country to give corporations more, not less, latitude in delegating authority to its agents.

7. The PSAs contain a severability provision whereby in the event that a provision is declared to be invalid the remainder of the PSA shall remain in full force and effect.

8. Invalidating the PSAs on the basis of Vermont law impermissibly burdens interstate commerce and violates the Takings Clause and the Due Process Clause of the United States Constitution.

For the foregoing reasons, MMWEC respectfully requests that the Court allow reargument. Because of the significance of this case to MMWEC, to the other parties and to Vermont municipalities and corporations generally, MMWEC respectfully requests that the Court grant a hearing and allow oral argument on this Motion for Argument.

Respectfully submitted,

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Dated: October 10, 1988

APPENDIX C

ENTRY ORDER

SUPREME COURT DOCKET NO. 86-555
APRIL TERM, 1987

APPEALED FROM:
Washington Superior Court
Docket No. S412-85WnC

VERMONT DEPARTMENT OF
PUBLIC SERVICE

v.

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC CO.,
et al.,

In the above entitled cause the Clerk will enter:

The motion for reargument filed by Massachusetts Municipal Wholesale Electric Co. (MMWEC) on October 11, 1988, fails to identify points of law or fact previously overlooked or misapprehended. The motion is denied.

FOR THE COURT:
Frederic W. Allen, Chief Justice
Concurring:

Louis P. Peck, Associate Justice
Albert W. Barney, Chief Justice (Ret.)
F. Ray Keyser, Associate Justice (Ret.)
Stephen B. Martin, Superior Judge, (Specially Assigned)

APPENDIX D

STATE OF VERMONT
WASHINGTON COUNTY, SS.

Vermont Department of Public Service, Plaintiff	
v.	Washington Superior Court
Massachusetts Municipal Wholesale Electric Co.; Village of Ludlow; Village of Lyndonville; Village of Morrisville; Village of Northfield; Vermont Electric Cooperative, Inc.; Washington Electric Cooperative, Inc., Defendants	Docket No. COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This action for declaratory and injunctive relief is brought by the Vermont Department of Public Service ("DPS") on behalf of the State of Vermont: on behalf of all present and potential ratepayers of the Villages of Ludlow, Lyndonville, Morrisville and Northfield; on behalf of all present and potential ratepayers of the Vermont Electric Cooperative, Inc. ("VEC") and of the Washington Electric Cooperative, Inc. ("WEC"); and, pursuant to the Department's authority to enforce all laws related to Vermont utilities. DPS seeks to have the Agreements known as the Project Six Power Sales Agreements ("PSAs", "Agreements") declared void, invalid, ineffective and unenforceable. A copy of the Agreements is attached to this Complaint as Exhibit A. The Department also seeks to

enjoin the six Vermont utility defendants from making payments under the terms of said Agreements to the defendant Massachusetts Municipal Wholesale Electric Company ("MMWEC"). DPS's claims arise under Titles 24 and 30 of the Vermont Statutes, under the United States and Vermont Constitutions, and under general contract law.

PARTIES

2. The Vermont Department of Public Service is an agency of the State of Vermont charged with the execution and supervision of all laws relating to public service corporations; with representation of the public interest in related proceedings; with representation of ratepayers; and, is authorized to prosecute this lawsuit on behalf of the State of Vermont by, among other authorities, special appointment by the Vermont Attorney General.

3. Municipal electric and cooperative electric systems in Vermont are public service corporations subject to the supervision of the Department of Public Service.

4. The Villages of Ludlow, Lyndonville, Morrisville and Northfield ("defendant Villages") are municipalities within the State of Vermont duly organized and chartered by the Vermont Legislature. The defendant Villages operate municipal electric light departments.

5. The defendant VEC is a non-profit corporation organized pursuant to Vermont law to provide low-cost electric energy and related services to its members. It has its principal place of business at Johnson, Vermont.

6. The defendant WEC is a non-profit corporation organized pursuant to Vermont law to provide low-cost electric energy and related services to its members. It has its principal place of business at East Montpelier, Vermont.

7. The defendant MMWEC is a public corporation organized pursuant to Massachusetts law for the purpose of engaging in joint power planning on behalf of its municipal members.

JURISDICTION

8. This court has jurisdiction over this matter and these parties pursuant to 4 V.S.A. § 113 and other statutes.

THE AUTHORITY OF VERMONT UTILITIES

9. With the exception of the Village of Lyndonville and the City of Burlington, the powers of Vermont municipalities with regard to the purchase of electricity for their citizens are set out by statute at 30 V.S.A. §§ 2902, 4002, and 5013.

10. The Vermont statutes do not authorize Vermont municipalities other than the Village of Lyndonville and the City of Burlington to purchase project capability except from Burlington, Lyndonville or the Vermont Public Power Supply Authority.

11. In signing thue PSAs the defendant Villages of Ludlow, Morrisville and Northfield agreed to purchase project capability from MMWEC.

12. 24 V.S.A. § 1822 prohibits municipal utilities from pledging their future earnings or profits without prior voter approval.

13. Section 5(c) of the Power Sales Agreements constitutes a pledge of future earnings or profits to meet participants' obligations to MMWEC.

14. In signing the PSAs the defendant Villages pledged their future revenue to MMWEC to the extent of their obligations under the Agreement.

15. The defendant Villages never sought nor received prior voter approval for their pledges of future revenue to MMWEC.

16. MMWEC never obtained or arranged for obtaining for the defendant Villages the right to pledge the Villages' future revenue.

17. 30 V.S.A. § 3032 prohibits electric cooperatives from encumbering any portion of their property without prior membership approval.

18. The Bylaws of VEC prohibit VEC from encumbering any substantial portion of its property without the prior approval of two-thirds of its membership.

19. The Bylaws of WEC prohibit WEC from encumbering any substantial portion of its property without the prior approval of two-thirds of its membership.

20. Section 5(c) of the Power Sales Agreements constitutes an encumbrance on property.

21. In signing the PSAs VEC and WEC encumbered their property by pledging future revenue to MMWEC to the extent of their obligations under the Agreements.

22. VEC and WEC never sought nor received prior membership approval for this encumbrance of their property.

23. MMWEC never obtained or arranged for obtaining for VEC and WEC, the right to encumber their property.

24. 30 V.S.A. § 108 prohibits an electric cooperative from pledging its property or issuing evidence of its indebtedness without the consent of the Vermont Public Service Board.

25. Section 5(c) of the Power Sales Agreements constitutes a pledge of corporate property.

26. The Power Sales Agreements are themselves evidence of the indebtedness of the participants signing them.

27. In signing the PSAs VEC and WEC pledged their corporate property by pledging future revenue to the extent of their obligations to MMWEC under the Agreements.

28. In signing the PSAs VEC and WEC issued evidence of their indebtedness to MMWEC.

29. Neither VEC nor WEC ever sought or obtained the consent of the Public Service Board to their pledges of corporate property.

30. Neither VEC nor WEC ever sought or obtained the consent of the Public Service Board to their issuance of evidence of their indebtedness.

31. MMWEC never obtained or arranged for obtaining for VEC or WEC, the right to pledge their corporate property.

32. MMWEC never obtained or arranged for obtained for VEC or WEC, the right to issue evidence of their indebtedness.

33. The Vermont Public Service Board is charged by Vermont statutes with the responsibility for setting rates and charges for electricity and related services, subject to findings that such rates are just and reasonable.

34. Section 5(c) of the PSAs commits Project Six participants to collect rates and charges at least sufficient to pay their obligations to MMWEC under the terms of the Agreements.

35. In signing the PSAs, VEC, WEC, and the defendant Villages committed themselves to charging their residents a minimum rate sufficient to pay their obligations to MMWEC without regard to the justness or reasonableness of those rates.

36. Under the terms of the PSAs ratepayers are deprived of their statutory rights to fair and properly set rates and to their procedural right to contest the reasonableness of utility charges imposed on them.

37. Under the terms of the PSAs ratepayers may be unjustly deprived of their property through rates and charges levied without any benefit given in return.

38. Section 5(c) of the PSAs constitutes an agreement to tax ratepayers if necessary to meet participants' obligations to MMWEC under any eventuality.

39. Act 179, Section 7 of the 1900 Vermont Acts, a part of the Charter of the Village of Ludlow provides that rate charges for electric use may be collected in the same manner as any tax assessed by the Village.

40. Act No. 313, Section 21 of the 1910 Vermont Acts, a part of the Charter of the Village of Morrisville provides that rate charges for electric use may be collected in the same manner as any tax assessed by the Village.

THE BACKGROUND OF THE AGREEMENTS

41. In 1971 the Public Service Company of New Hampshire (PSNH) decided to construct a two unit nuclear power plant at Seabrook, New Hampshire ("Seabrook"). In 1972 PSNH formally began to seek licensing approvals and engaged in detailed planning for Seabrook. The original cost projected for the two units was $973 million with completion target dates of November 1979 for unit 1 and November 1981 for unit 2. PSNH retained a 50% ownership interest in Seabrook and the remaining 50% was sold in shares to 15 other New England utilities.

42. In 1976 MMWEC purchased its first small .16 percent share of Seabrook. MMWEC acquired an additional 4.3% ownership interest in 1977, and an additional 1.4% ownership interest in 1978.

43. In late 1978, due to difficulties PSHN was having financing its 50% ownership interest, PSNH began soliciting offers from other Seabrook owners for purchase of a portion of PSNH's interest.

44. When MMWEC determines that an ownership interest in a given power plant, like Seabrook, is available, it contacts its members to determine whether there is an interest in having MMWEC purchase a share of the power plant in question. If its members indicate sufficient interest MMWEC takes steps to obtain an ownership interest in the power plant and creates a power planning and acquisition vehicle, termed a "Project," through which its members can participate in the purchase of a share of the power plant's potential.

45. On or about December 15, 1978, MMWEC submitted to PSNH a letter expressing interest in purchasing an additional ownership interest in Seabrook.

46. Due to the financial difficulties PSNH was having, in March of 1979 the New Hampshire Public Utilities Commission ("NHPUC") ordered PSNH to immediately reduce its ownership interest in Seabrook to 28%.

47. In May, 1979, the New Hampshire legislature passed a law prohibiting PSNH from including costs of construction work in progress in its rate base.

48. In the first half of 1979 MMWEC took steps to create a Project through which its members could participate in the purchase of an additional share in Seabrook.

THE TERMS OF THE AGREEMENT

49. The mechanism used by MMWEC and its members to formalize the agreement to participate in a Project is the Power Sales Agreement. The Power Sales Agreement associated with a Project establishes the portion of that Project that has been purchased by each public power entity and sets out the obligations of each participating entity with respect to that Project.

50. A Power Sales Agreement obligates a Project participant to pay its pro-rata share of all expenses incurred by MMWEC in relation to the Project, including any principal and interest obligations incurred as a result of debt issued by MMWEC to support the Project. Each participant is expressly required by the terms of the Power Sales Agreement to fix electric rates sufficient to provide revenue to meet its obligations under the contract.

51. The Power Sales Agreement used by MMWEC and its participants to formalize their agreements relating to the purchase of a 6% interest in Seabrook in 1979 is known as the Project Six Power Sales Agreement.

52. Under the terms of the PSA, MMWEC agrees to sell and the participants agree to purchase their share of "project capability." PSA, Section 4.

53. As defined in the PSA, " 'project capability' means the amounts of electric capacity and energy, if any, the Project is capable of producing at any particular time (including times when the Project is not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduce or curtailed, in each case in whole or in part for any reason whatsoever), ..." PSA, Section 1(q).

54. Under the terms of the PSA, a participants' share is the percentage of project capability set opposite the participants' name in Exhibit A attached to the PSA, with certain adjustments provided for. PSA, Section 1(n).

55. Under the terms of the PSA, a "Participant" is an entity specified in Exhibit A attached to the PSA which enters into a Power Sales Agreement. PSA, Section 1(m).

56. By its terms the PSA is effective upon execution and delivery of Agreements entered into by MMWEC and participants whose participant's shares total 100%.

57. Under the terms of the PSA, participants are not required to make payments to MMWEC except from revenues and other monies derived by them from their electric departments or systems. The Agreement further provides, however, that participants will collect revenues for electric power and other related services at least sufficient to provide revenues to meet their obligations to MMWEC under the Agreement, and to pay all other amounts payable from or constituting a charge and lien upon such revenue, including amounts sufficient to pay the principal of and interest on all bonds issued by the participant for electric purposes, regardless of whether any power is received. PSA, Section 5 (c).

58. The Project Six Power Sales Agreements are unconditional guarantees of payment on revenue bonds to be issued by

MMWEC, expressly secured by pledges of a participant's utility revenues.

59. Payments must be made to MMWEC under the terms of the PSAs whether or not the Project or any facility of it is undertaken, completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of the Project or any facility of it for any reason whatsoever in whole or in part. PSA, Section 5(d).

60. Under the terms of the PSA, participants are prohibited from issuing bonds, notes or other evidence of indetedness payable from or secured by a lien on revenues derived from their electric systems without providing first for the payment of Project Six operating expenses — including monthly power costs — from such revenues except under certain conditions. PSA, Section 5(f).

61. Under the terms of the PSA, default in payment by any participant results in an automatic increase in every other participant's share, pro rata, for the term of the Agreement, up to an accumulated maximum of 25% of the participant's share prior to such increase. PSA, Section 12(d).

62. Under the terms of the PSA, MMWEC retains full ownership and control of the Project.

63. Under the terms of the PSA, MMWEC obligates itself to use its best efforts in accordance with prudent utility practice to arrange for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the Project. PSA, Section 3(a)(i).

64. Under the terms of the PSA, MMWEC obligates itself to use its best efforts in accordance with prudent utility practice to obtain, or arrange for obtaining, permits and other rights and regulatory approvals necessary for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the Project. PSA, Section 3(a)(ii).

65. Under the terms of the PSA, MMWEC obligages itself to operate and maintain the Project, or cause the Project to be operated and maintained, in accordance with prudent utility practice. PSA, Section 3(d).

66. Under the terms of the PSA, MMWEC obligates itself to operate and maintain the Project, or cause the Project to be operated and maintained, so as to meet the requirements of government agencies having jurisdiction. PSA, Section 3(d).

67. Under the terms of the PSA, MMWEC obligates itself, subject to the terms of its Joint Operating Agreement, to terminate either Seabrook facility when MMWEC determines that such facility is not capable of producing energy consistent with prudent utility practice. PSA, Section 10.

68. The PSA terminates by its terms when either (i) all of the facilities have been terminated as provided for in the PSA, (ii) the principal of and premium, if any, and interest on all of the bonds have been paid or funds set aside for the payment or retirement thereof in accordance with the bond resolution, and (iii) all other obligations and liabilities under the PSA have been paid or provided for. PSA, Section 2.

69. The PSAs are made under and governed by the law of the Commonwealth of Massachusetts. Section 19.

VERMONT'S PARTICIPATION IN THE AGREEMENTS

70. From December, 1978 through September, 1979 MMWEC representatives solicited interest from Vermont utilities in purchasing Seabrook capability under the Power Sales Agreements.

71. From December, 1978 through September, 1979 MMWEC representatives deliberately solicited participation by Vermont utilities in Project Six.

72. From December, 1978 through September, 1979 MMWEC representatives deliberately solicited participation by Vermont utilities in Project Six.

73. From December, 1978 through September, 1979 MMWEC representatives repeatedly corresponded with representatives of Vermont utilities regarding the purchase and sale of shares of project capability in Project Six.

74. From December, 1978 through September, 1979 MMWEC representatives met personally with representatives of Vermont utilities to discuss the purchase and sale of shares of project capability in Project Six.

75. In May or June of 1979 MMWEC invited representatives of Vermont utilities to MMWEC's annual meeting for the purpose of discussing the purchase and sale of shares of project capability in Project Six.

76. Some representatives of Vermont utilities did attend the MMWEC annual meeting for the purpose of discussing the purchase and sale of shares of project capability in Project Six.

77. Pursuant to Vermont Public Service Board General Order 45, on or about May 22, 1979 VEC filed notice of its intent to purchase shares of project capability from MMWEC.

78. In late June of 1979, MMWEC advised other interested Vermont utilities to file notice of their intent to purchase Seabrook capability with the PSB pursuant to General Order 45.

79. By letter dated June 28, 1979, the Villages of Enosburg, Hardwick, Ludlow, Lyndonville, Morrisville, Northfield, Stowe and Swanton, and the Washington Electric Cooperative, Inc. informed the PSB of their intention to purchase Seabrook capability from MMWEC.

80. On or about September 12, 1979, VEC filed a copy of the Project Six Power Sales Agreement with the PSB pursuant to General Order 45.

81. On or about September 18, 1979, the Villages of Enosburg, Hardwick, Ludlow, Lyndonville, Morrisville, North-

field, Stowe and Swanton, and the Washington Electric Cooperative, Inc. filed a copy of the Project Six Power Sales Agreement with the PSB pursuant to General Order 45.

82. By letter dated September 21, 1979, the PSB advised the Villages of Enosburg, Hardwick, Ludlow, Lyndonville, Morrisville, Northfield, Stowe and Swanton and the Washington Electric Cooperative, Inc. that its period of review under General Order 45 had commenced on September 18, 1979 and that no binding commitments were to be made under the Agreements prior to the running of the 90 day review period.

83. By letter dated September 26, 1979, the Villages of Enosburg, Hardwick, Ludlow, Lyndonville, Morrisville, Northfield, Stowe and Swanton, and the Washington Electric Cooperative, Inc. advised the PSB that the Power Sales Agreements would in all probability be signed on September 27, 1979, but that in accordance with the Board's opinion expressed in a letter dated September 21, 1979, the Agreements would be held in escrow pending Board action until the review period had run.

84. On or about September 27, 1979, the Villages of Ludlow, Lyndonville, Morrisville, Northfield, Stowe and Swanton, and VEC and WEC, along with twenty-two MMWEC member utilities and three other New England utilities, signed Project Six Power Sales Agreements.

85. The PSA signed by VEC was held in escrow and not delivered until on or about November 26, 1979.

86. The PSAs signed by the Villages of Ludlow, Lyndonville, Morrisville, Northfield, Stowe and Swanton and by WEC were held in escrow and not deliverred until on or about December 18, 1979.

87. All of the utilities which signed PSAs on September 27, 1979 believed that the Vermont utilities had authority to enter into the Agreements.

88. All of the utilities which signed PSAs on September 27, 1979 believed that the Town of Groton, Massachusetts had authority to enter into a PSA.

89. All of the utilities which signed PSAs on September 27, 1979 believed that the Town of Hull, Massachusetts had authority to enter into a PSA.

90. All of the utilities which signed PSAs on September 27, 1979 believed that substantially total participation in Project Six was assured as set out in Exhibit A attached to the PSA.

91. As set out in Exhibit A attached to the PSAs the Vermont utilities were allotted in total a 13.5966 percent share of project capability as follows: Village of Ludlow, .7947; Village of Lyndonville, .8625; Village of Morrisville, 1.0350; Village of Northfield, .2875; Village of Stowe, 2.0125; Village of Swanton, 1.3018; Vermont Electric Cooperative, Inc., 5.7501; Washington Electric Cooperative, Inc., 1.5525.

92. By letter dated October 1, 1979 the Villages of Ludlow, Lyndonville, Morrisville, Northfield, Stowe and Swanton, and the Washington Electric Cooperative, Inc. filed with the PSB an execution copy of a PSA and a letter from MMWEC consenting to the holding of the PSAs in escrow for 90 days from September 18, 1979.

93. On or about October 5, 1979, MMWEC's Petition for Project Six financing approval was filed with the Massachusetts Department of Public Utilities ("MDPU") as Docket No. 20248. At the time the Petition was filed (for approval of $335 million in bonds) the total cost of Seabrook was estimated by PSNH to be $2.6 billion. Completion dates of April 1983 and February 1985 were anticipated for the two nuclear facilities.

94. On or about November 16, 1979, the State of Vermont, by and through its Attorney General, petitioned the PSB to conduct a public investigation into Seabrook, or, in the alternative, to condition its approval of the PSAs on endorsement by affirmative vote of affected municipal residents and coop-

erative members. As a basis for its Petition the State cited the magnitude of the costs involved, the fact that costs had risen substantially since the PSB had last investigated Seabrook, the possibility that the PSAs could obligate Vermont utilities to pay for energy projects which would only benefit Massachusetts, a lack of data, and the unwillingness of the involved Villages, VEC and WEC to respond to the State's request for information.

95. By letter dated November 27, 1979 the State of Vermont, by and through its Attorney General, advised the PSB of its opinion that it was the Board's duty in the case of the municipal Project Six participants to require a public vote on the PSAs.

96. On or about February 6, 1981, MDPU approved MMWEC's October 5, 1979 Project Six financing request.

97. During the sixteen month period it took to obtain MDPU approval of MMWEC's Project Six financing request, cost estimates for Seabrook rose to $3.12 billion.

98. The Vermont Villages of Stowe and Swanton, which signed PSAs on or about September 27, 1979, subsequently withdrew as Project Six Participants. Two MMWEC member utilities and one New Hampshire utility also withdrew. These withdrawals left twenty-eight participants in Project Six including six Vermont utilities that are defendants to this action.

99. When participation in Project Six was final the combined share of project capability allotted to Vermont utilities was 14.9282 percent, allocated as follows: Ludlow, 1.0013; Lyndonville, 1.0868; Morrisville, 3.2763; Northfield, .3623; Vermont Electric Cooperative, Inc., 7.2453; Washington Electric Cooperative, Inc., 1.9562. No new General Order 45 notice was submitted to the PSB to cover the utilities' June 1, 1981 contract to purchase this additional Seabrook power.

THE STATUS OF THE SEABROOK PROJECT

100. In 1981-82, PSNH's continuing financial problems caused NHPUC to restrict funding for Seabrook 2.

101. In November of 1982, the estimated completion dates for Seabrook were extended to December 1984 for unit 1 and March 1987 for unit 2. Total cost estimates rose to $5.12 billion.

102. In 1983, MDPU denied MMWEC permission to issue additional long-term debt for Seabrook construction.

103. In 1984 the construction program for the Seabrook 2 facility was essentially abandoned.

104. By early 1985 some experts were predicting a completion date for Seabrook 1 as late as 1990, with an anticipated cost as high as $11.2 billion if Seabrook is ever completed. Any power produced by the Seabrook project will be several times more expensive than other alternatives now available.

105. Seabrook is not capable of producing energy at an economic price.

MMWEC'S STATUS

106. In 1984 and 1985, MMWEC's bond ratings were reduced.

107. On April 4, 1985, the MDPU again denied MMWEC permission to issue additional bonds to finance further construction of Seabrook 1.

108. On April 11, 1985, Moody's suspended MMWEC's bond rating.

109. On April 12, 1985, Standard and Poor's put MMWEC on credit watch with negative implications.

110. Due to the high cost overruns in the Seabrook construction program and repeated extension of completion deadlines, MMWEC's ability to finance its ownership interest in Seabrook is in serious jeopardy.

111. MMWEC cannot continue to meet its payment obligations as a joint owner after December, 1985.

112. If MMWEC is unable to meet its construction payment obligations as a Seabrook joint owner, it will most likely forfeit its entitlements to Seabrook power.

113. MMWEC has an urgent, if not emergency, need for financial relief in order to prevent catastrophic impacts on its entire program.

THE IMPACT OF PROJECT SIX ON VERMONT RATEPAYERS

114. MMWEC has taken no steps to terminate Seabrook or to seek its termination by agreement of the joint owners.

115. The cost of the Seabrook facility has become so great that payment of all obligations under the PSAs will cause severe long-term rate shock to ratepayers of the defendant Villages, VEC and WEC if Seabrook 1 is completed.

116. The rates which will be imposed on affected ratepayers will be beyond the means of many people to meet.

117. Rate shock will result in service curtailment for those persons who will no longer be able to afford electric service.

118. The effect of the Power Sales Agreements will be to curtail, and in some cases terminate, electric service to present ratepayers without providing those ratepayers with any right or means to contest the reasonableness of the rates imposed.

119. Payment of interest obligations to MMWEC by the Vermont utilities will cause severe financial hardship to those utilities.

STATUS OF PAYMENT BY VERMONT PARTICIPANTS UNDER THE AGREEMENT

120. MMWEC intends to begin billing Project Six participants for their full share of interest on its Seabrook debt no later than January 1, 1986.

121. If MMWEC begins billing the Village of Ludlow on January 1, 1986 for Ludlow's share of interest on MMWEC's Project Six debt, Ludlow ratepayers' electric rates will immediately rise approximately 18.8 percent.

122. If MMWEC begins billing the Village of Lyndonville on January 1, 1986 for Lyndonville's share of interest on MMWEC's Project Six debt, Lyndonville ratepayer's electric rates will immediately rise approximately 12.2 percent.

123. If MMWEC begins billing the Village of Morrisville on January 1, 1986 for Morrisville's share of interest on MMWEC's Project Six debt, Morrisville ratepayers' electric rates will immediately rise approximately 46.8 percent.

124. If MMWEC begins billing the Village of Northfield on January 1, 1986 for Northfield's share of interest on MMWEC's Project Six debt, Northfield ratepayers' electric rates will immediately rise approximately 6.8 percent.

125. If MMWEC begins billing VEC on January 1, 1986 for VEC's share of interest on MMWEC's Project Six debt, member ratepayers' electric rates will immediately rise approximately 30.0 percent.

126. If MMWEC begins billing WEC on January 1, 1986 for WEC's share of interest on MMWEC's Project Six debt, member ratepayers' electric rates will immediately rise approximately 16.2 percent.

127. Effective June 1, 1985, the Villages of Lyndonville and Northfield have already filed rate increases that in fact collect from their ratepayers a portion of the amount they anticipate being billed for interest by MMWEC under the Agreements.

128. Effective September 1, 1985, the Village of Morrisville has already filed a rate increase that in fact collects from its ratepayers a portion of the amount it anticipates being billed for interest by MMWEC under the Agreements.

129. Defendant Village of Ludlow has represented that it will file a rate case in the near future which will include a portion of the amount it anticipates being billed for by MMWEC under the Agreement.

130. Defendants VEC and WEC have represented that they will borrow funds to pay MMWEC the amount they anticipate being billed for by MMWEC under the Agreements on January 1, 1986.

CAUSES OF ACTION

COUNT I

131. The powers of a municipality are only those specifically granted by the legislature. The charter of a municipal corporation is to be strictly construed against it. Every reasonable doubt as to a municipality's authority to act must be resolved adversely to it.

132. The Village of Ludlow, Morrisville and Northfield, at the time they entered into the Power Sales Agreements, were without statutory authority to contract with MMWEC for the purchase of project capability.

133. The Power Sales Agreements, having been entered into without authority by the Villages aforesaid, are *ultra vires*, void, invalid, ineffective and unenforceable.

COUNT II

134. Twenty-four V.S.A. § 1822 prohibits municipal corporations operating public utilities from pledging utility earn-

ings or profits to secure payment for costs of operating or managing their utilities without prior voter approval.

135. The agreements of the Village of Ludlow, Lyndonville, Morrisville and Northfield, to make all payments due to MMWEC under the Power Sales Agreements from future fees and charges, constitutes precisely the type of pledges forbidden without voter approval.

136. The Villages' pledges of future revenue without voter approval, incorporated in Section 5(c) of the Power Sales Agreements, violate the statute and render the PSAs *ultra vires*, void, invalid, ineffective and unenforceable.

COUNT III

137. 30 V.S.A. § 3032 prohibits VEC and WEC from encumbering all or any portion of their property without prior membership approval.

138. The agreements of VEC and WEC, to make all payments due to MMWEC under the Power Sales Agreements from future fees and charges, constitute precisely the type of encumbrance forbidden without membership approval.

139. VEC's and WEC's encumbrance of their property without membership approval, incorporated in Section 5(c) of the PSAs, violates the statute and renders the Agreements *ultra vires*, void, invalid, ineffective and unenforceable.

COUNT IV

140. Article VIII of the Bylaws of VEC prohibits the Cooperative from encumbering all or any substantial portion of its property without prior membership approval.

141. Article IX of the Bylaws of WEC prohibits the Cooperative from encumbering all or any substantial portion of its property without prior membership approval.

142. The agreements of VEC and WEC, incorporated in Sections 5(d) and 12(d) of the Power Sales Agreements as unconditional pledges of future revenue are encumbrances on substantial portions of VEC's and WEC's property.

143. The agreements referred to at paragraph 142 above, having been made without membership approval, render the Power Sales Agreements *ultra vires*, void, invalid, ineffective and unenforceable.

COUNT V

144. Thirty V.S.A. § 108 prohibits VEC and WEC from pledging corporate property or issuing evidence of their indebtedness without the consent of the Vermont Public Service Board after a finding by the Board that the proposed action will be consistent with the general good of the state.

145. The agreements of VEC and WEC, incorporated in Sections 5(c) and 12(d) of the PSAs as pledges of corporate property, being without Board approval, violate 30 V.S.A. § 108 and render the Agreements *ultra vires*, void, invalid, ineffective and unenforceable.

146. The agreements of VEC and WEC, incorporated in Sections 5(d) and 12(d) of the PSAs as unconditional obligations of indebtedness secured by the cooperatives' ability to charge rates for electric service, being without Board approval violate 30 V.S.A. § 108 and render the Agreements *ultra vires*, void, invalid, ineffective and unenforceable.

COUNT VI

147. Thirty V.S.A. §§ 225-227 authorize the Vermont Public Service Board to set such rates for electric service as may appear just and reasonable after full review of rate proposals and the opportunity for public notice and hearing.

148. The agreements of the defendant Villages, VEC and WEC, to fix, revise and collect fees or charges for electric power sufficient to meet their obligations to MMWEC under the PSAs, constitute improper usurpations of the Vermont Public Service Board's ratemaking authority as established by statute.

149. The agreements of the defendant Villages, VEC and WEC, incorporated in Section 5(c) of the PSAs and described above, conflict with Vermont law and are therefore *ultra vires*, void, invalid, ineffective and unenforceable.

COUNT VII

150. The Fifth and Fourteenth Amendments to the United States Constitution restrain governmental actions which deprive individuals of their property interests without due process of law.

151. The effect of the agreements of the defendant Villages, VEC and WEC, incorporated in Sections 5(c) and (d) of the Power Sales Agreements, is to deprive ratepayers of money to which they are entitled, of their statutory rights to just and reasonable rates, to their rights of prior approval as voters or as members of cooperatives, and to statutory and administrative procedural rights that would otherwise be followed in normal rate making proceedings.

152. The Power Sales Agreements as applied to Vermont ratepayers thus deprive them of procedural due process and are a taking without just compensation in derogation of the Fourteenth Amendment of the United States Constitution. As such the PSAs are *ultra vires*, void, invalid, ineffective and unenforceable.

COUNT VIII

153. Chapter I, Articles 1, 2, 4 and 9 of the Vermont Constitution restrain actions which interfere with the right of Vermont citizens to be protected in the enjoyment of their property and to have recourse to the law when they are not.

154. The actions of VEC and WEC are such actions under the Vermont Constitution by virtue of the cooperatives' exclusive franchise to provide electric service to citizens residing in their service territory and the pervasive regulation of the manner in which they do so.

155. The effect of the agreements of the defendant Villages, VEC and WEC is to deprive ratepayers of money to which they are entitled, of their statutory rights to just and reasonable rates, to their rights of prior approval as voters or as members of the cooperatives, and to statutory and administrative procedural rights that would otherwise be followed in normal rate making proceedings.

156. The Power Sales Agreements as applied to Vermont ratepayers are thus deprivations of due process; takings without just compensation; and deprivals of remedies secured at law, all in derogation of the Vermont Constitution. As such the Power Sales Agreements are *ulta vires*, void, invalid, ineffective and unenforceable.

COUNT IX

157. Chapter 1, Article 9 of the Vermont Constitution protects citizens from taxation for any purpose which is not more beneficial to the taxing community than would be the money raised, if not collected.

158. The agreement of the defendant Villages, incorporated in Section 5(d) of the Power Sales Agreements, constitutes a promise by the defendant Villages to impose a "rate" in the

nature of a surcharge or tax, if necessary, to meet their obligations to MMWEC under the PSAs.

159. Act No. 179, Section 7 of the 1900 Vt. Acts, a part of the Charter of the Village of Ludlow, provides that rate charges for electric use may be collected in the same manner as any tax assessed by the Village.

160. Act No. 313, Section 21 of the 1910 Vt. Acts, a part of the Charter of the Village of Morrisville, provides that rate charges for electric use may be collected in the same manner as any tax assessed by the Village.

161. The Power Sales Agreements provide for payments to MMWEC through rates which are in the nature of, and as to Ludlow and Morrisville may be collected as, a tax, whether or not the Project or any facility thereof is completed or operating or of any benefit whatsoever to the ratepayers and taxpayers of the defendant villages. The Agreements therefore violated Chapter I, Article 9 of the Vermont Constitution, which protects citizens from taxation for any purpose which is not more beneficial to the taxing community than would be the money raised if not collected.

COUNT X

162. Pursuant to Section 19 of the Power Sales Agreements, any interpretation of those Agreements required to be made is governed by the law of the Commonwealth of Massachusetts.

163. Under Massachusetts law the doctrine of unconscionability, set out in principle in Article 2 of the Uniform Commercial Code, M.G.L.A. c. 106, § 2-302, is also applicable to contracts made in non-consumer commercial settings. *Zapatha* v. *Dairy Mart, Inc.*, 408 N.E.2d 1370 (1980).

164. The open-ended agreements of the Villages of Ludlow, Lyndonville, Morrisville and Northfield, and of VEC and

WEC, to pay their obligations to MMWEC under the Agreements whether or not the Project or any Facility thereof is undertaken, completed, operable or operating and whether or not MMWEC performs any of *its* obligations under the Agreements, constitute an unconscionable bargain on their face, and are in fact unconscionable.

165. The effect of the PSAs will be to impose substantially higher utility costs on thousands of Vermont citizens. The rate shock and service curtailment which are certain to result establish that the Agreements contravene public policy, are unconscionable, void, invalid, ineffective and unenforceable.

COUNT XI

166. Section 2 of the Power Sales Agreements provides that the PSAs shall be effective upon their execution and delivery by MMWEC and participants whose participant's shares total 100 percent. A condition precedent to enforceability of the PSAs or to any entity incurring an obligation under them is thus that all participants who sign the PSAs be bound.

167. As set out in paragraphs 131-146, none of the defendant Villages, VEC and WEC, or the Towns of Groton, Massachusetts and Hull, Massachusetts, had valid authority to enter into the Power Sales Agreements.

168. The 100 percent participation condition precedent not having been fulfilled, no duty or obligation to perform under the Agreements arose in any of the participants. The Agreements are void, invalid, ineffective and unenforceable.

COUNT XII

169. As set out at paragraphs 131-146, none of the defendant Villages, VEC or WEC, had proper authority to enter into the Power Sales Agreements.

170. At the time the PSAs were signed, all thirty-three signators were mutually mistaken as to the authority of the Vermont utilities to enter into the Agreements.

171. The basic assumption of authority to enter the PSAs having had a material effect on the agreed-upon exchange of performances and allocation of risk, the Agreements are void, invalid, ineffective and unenforceable.

COUNT XIII

172. Section 2 of the Power Sales Agreements provides that the PSAs shall be effective upon their execution and delivery by MMWEC and Participants listed in Exhibit A whose participants' shares total 100.0 percent.

173. Based on representations by MMWEC that such 100.0 percent participation was substantially secured, and in reliance on those representations, thirty-three utilities signed the Power Sales Agreements.

174. On or before September 27, 1979, MMWEC knew or should have known that the authority of all of the Vermont participants was subject to question.

175. On or before September 27, 1979, knew or should have known that the authority of the Towns of Groton, Massachusetts and Hull, Massachusetts to enter the PSAs was under challenge.

176. The representations (both express and implied) of MMWEC to the Vermont utilities signing Power Sales Agreements that 100.0 percent participation was substantially secured, and MMWEC's failure to disclose the authority issues of which it had knowledge, was a material misrepresentation of fact going to the essential terms of the bargain.

177. MMWEC's material misrepresentation that 100.0 percent participation was substantially secured prevented a valid

contract from being formed. The apparent contract is void, invalid, ineffective and unenforceable.

178. MMWEC's material misrepresentation, which induced the parties to enter the PSAs, renders the Agreements void, invalid, ineffective and unenforceable.

179. On or before December 31, 1979, the contract deadline, MMWEC knew or should have known that it was the opinion of the Attorney General of the State of Vermont that the Villages of Ludlow, Lyndonville, Morrisville and Northfield lacked authority to enter into the Power Sales Agreements.

180. The assertions of MMWEC to the Massachusetts Department of Public Utilities, evidenced in its financing proceeding from October, 1979 through February, 1981, that substantially 100 percent participation in Project Six was secured, was a material misrepresentation of fact going to the essential terms of the bargain.

181. MMWEC's material misrepresentation, which induced the parties to remain Project participants, renders the PSAs void, invalid, ineffective and unenforceable.

COUNT XIV

182. Pursuant to Sections 3(a) and (d) and 10(i)(B), of the PSAs, MMWEC owed a duty to the Project Six participants to use its best efforts in accordance with prudent utility practice in obtaining, or arranging for obtaining, the financing, planning, engineering, design, acquisition, construction, operation, maintenance and termination of the Project.

183. MMWEC failed to timely review the Vermont statutes and obtain, or arrange for obtaining, proper approvals and consents.

184. MMWEC failed to timely review the Massachusetts statutes and obtain or arrange for obtaining proper approvals.

185. MMWEC failed to change or attempt to change the manner in which the Seabrook construction program was being operated and maintained.

186. MMWEC has failed to terminate and continues to fail to terminate the Seabrook facility or to seek its termination by the joint owners.

WHEREFORE, the Department of Public Service requests that the court:

1. Declare the Project Six Power Sales Agreements void, invalid, ineffective and unenforceable as violative of Vermont statutes, of the United States and Vermont Constitutions, and of general contract law.
2. Enter a permanent injunction prohibiting the Villages of Ludlow, Lyndonville, Morrisville, and Northfield, and prohibiting VEC and WEC, from making payments to MMWEC under the Project Six Power Sales Agreements.

DATED at Montpelier, Vermont this 18th day of October, 1985.

STATE OF VERMONT
DEPARTMENT OF PUBLIC SERVICE

By: _____
Michael Marks
Director for Public Advocacy,

By: _____
Dinah Yessne
Special Counsel,

Attorneys for Plaintiff
Special Assistant Attorneys General
for the State of Vermont

APPENDIX E

STATE OF VERMONT
WASHINGTON COUNTY, S.S.

VERMONT DEPARTMENT OF PUBLIC SERVICE, Plaintiff,	)	Washington Superior Court
v.	)	Civil Action
MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY, Defendant.	)	Docket No. 5-412-85W

ANSWER OF THE MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY.

The Massachusetts Municipal Wholesale Electric Company (MMWEC) answers Count I through Count IX, and Count XV through XVIII, of the Amended Complaint of the plaintiff, Vermont Department of Public Service (DPS), as follows:

FIRST DEFENSE

1. The allegations set forth in paragraph 1 of the Complaint constitute a statement of DPS' claims for which no response is required. To the extent these allegations constitute allegations of fact, the allegations are denied. MMWEC denies that Exhibit A to the Complaint is an accurate or true copy of the Project Six Power Sales Agreement (PSA).

. . .

6. The doctrines of conversion, constructive trust, and unjust enrichment, and tne remedy of damages, are inapplicable to MMWEC in the instant action.

EIGHTH DEFENSE

The Court lacks jurisdiction over the Plaintiff's Complaint under the doctrine of primary jurisdiction and exhaustion of administrative remedies.

NINTH DEFENSE

The conduct of the Vermont Department of Public Service, by prosecution of the present litigation and otherwise, constitutes state action within the meaning of the United States Constitution; and violates Article I, § 10, cl. 1 prohibiting the impairment of contracts.

TENTH DEFENSE

The conduct of the Vermont Department of Public Service, by prosecution of the present litigation and otherwise, constitutes state action within the meaning of the United States Constitution; and constitutes the deprivation of property of MMWEC without due process of law as guaranteed by the Fourteenth Amendment.

ELEVENTH DEFENSE

The conduct of the Vermont Department of Public Service, by prosecution of the present litigation and otherwise, exceeds

the police powers conferred upon the states by the Tenth Amendment to the United States Constitution.

TWELFTH DEFENSE

The conduct of the Vermont Department of Public Service, by prosecution of the present litigation and otherwise, burdens and discriminates against the Defendants' activities in interstate commerce in violation of the Commerce Clause of the United States Constitution, Article I, § 8, cl. 3.

THIRTEENTH DEFENSE

The conduct of the Vermont Department of Public Service by prosecution of the present litigation and otherwise, constitutes state action, and violates the privileges and immunities of the Defendant MMWEC as protected by the Fourteenth Amendment to the United States Constitution.

FOURTEENTH DEFENSE

The conduct of the Vermont Department of Public Service, by prosecution of the present litigation and otherwise, constitutes state action and denies equal protection of the laws to the Defendant MMWEC in violation of the Fourteenth Amendment to the United States Constitution.

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC COMPANY

By its attorneys,

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Dated: May 1, 1986

APPENDIX F

STATE OF VERMONT
WASHINGTON COUNTY, S.S.

Vermont Department of Public Service, in Its Own Capacity, and *ex rel.* the State of Vermont and the Ratepayers of the Vermont Utilities That Are Parties to This Case and The Village of Stowe and The Vermont Electric Cooperative, Inc. Plaintiffs v. Massachusetts Municipal Wholesale Electric Co.; Village of Ludlow; Village of Lyndonville; Village of Morrisville; Village of Northfield; Washington Electric Cooperative, Inc. Defendants	)	Washington Superior Court Civil Action Docket No. S-412-85 WnC

DEPARTMENT OF PUBLIC SERVICE
RENEWED
MOTION FOR SUMMARY JUDGMENT

NOW COMES the Plaintiff Vermont Department of Public Service, by and through its Director for Public Advocacy and Special Counsel, appearing also as Special Assistant Attorneys

General on behalf of the State of Vermont, and pursuant to the Stipulation of the parties and this Court's Order dated August 8, 1986 hereby renews its motion for summary judgment against each and all of the defendants under V.R.C.P. 56 on the specific grounds set forth in its memoranda in this matter. These grounds include the following bases for judgment:

1. Against the Villages of Ludlow, Morrisville and Northfield on the grounds that each was without statutory authority to contract with the Massachusetts Municipal Wholesale Electric Company ("MMWEC") for the purchase of project capability (Count I);
2. Against the Villages of Ludlow, Lyndonville, Morrisville and Northfield on the grounds that each redelegated its municipal power and authority to MMWEC in violation of Vermont law (Count XIX);
3. Against the Villages of Ludlow, Lyndonville, Morrisville and Northfield on the ground that each pledged to MMWEC earnings and profits to be derived from the operation of its utility system without first securing voter approval as required by 24 V.S.A. § 1822 (Count II);
4. Against the Villages of Ludlow, Lyndonville, Morrisville and Northfield on the ground that each incurred debt and issued evidence of its indebtedness to MMWEC without first securing voter approval as required by 24 V.S.A. § 1822 (Count II);
5. Against the Vermont Electric Cooperative, Inc. ("VEC") and the Washington Electric Cooperative, Inc. ("WEC") on the ground that each encumbered its property and incurred debt without membership approval as required by 30 V.S.A. § 3032 and each of their Bylaws (Counts III and IV);

6. Against VEC and WEC on the ground that each pledged its corporate property without the consent of the Vermont Public Service Board as required by 30 V.S.A. § 108 (Count V);
7. Against VEC and WEC on the ground that each issued evidence of its indebtedness to MMWEC without the consent of the Vermont Public Service Board as required by 30 V.S.A. § 108 (Count V);
8. Against each of the defendants on the ground that each usurped powers delegated to the Vermont Public Service Board to determine and set just and reasonable rates (Count VI);
9. Against each of the defendants on the ground that each violated the rights of ratepayers to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution (Count VII);
10. Against each of the defendants on the ground that each violated the rights of ratepayers to due process of law and other property rights under Chapter I, Articles 1, 2, 4 and 9 of the Vermont Constitution (Count VIII);
11. Against the Villages of Ludlow, Lyndonville, Morrisville and Northfield on the ground that each violated the right of its ratepayers not to be taxed for a non-beneficial purpose (Count IX);
12. Against each of the defendants on the ground that all conditions precedent to the validity of Project No. 6 Power Sales Agreements were not met (Count XI);

In support of this Motion, plaintiff relies upon the attached Affidavit and Memoranda of Law.

Dated at Montpelier, Vermont this 22nd day of September, 1986.

STATE OF VERMONT
DEPARTMENT OF PUBLIC SERVICE

By: /s/ _____
Michael Marks
Director for Public Advocacy

By: /s/ _____
Dinah Yessne
Special Counsel

Attorneys for Plaintiff

Special Assistant Attorneys General
for the State of Vermont

APPENDIX G

STATE OF VERMONT

Washington, ss. Superior Court
Civil Action
No. S-412-85 WnC

Vermont Department of Public Service,
Plaintiff,
v.
Massachusetts Municipal Wholesale Electric Co. *et al.*,
Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56, Vt. R. Civ. P., the defendants Massachusetts Municipal Wholesale Electric Co., Washington Electric Cooperative and the Villages of Ludlow, Lyndonville, Morrisville and Northfield move for entry of summary judgment in their favor on the grounds that there is no issue as to any material fact and that they are entitled to judgment as a matter of law, all as set forth in defendants' briefs filed of even date herewith.

By their attorneys,

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Dated: September 22, 1986

APPENDIX H

STATE OF VERMONT
WASHINGTON COUNTY, SS.

VERMONT DEPARMENT OF PUBLIC SERVICE, VILLAGE OF STOWE, AND VERMONT ELECTRIC COOPERATIVE, INC.

VS.

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC CO.; VILLAGE OF LUDLOW; VILLAGE OF LYNDONVILLE; VILLAGE OF MORRISVILLE; VILLAGE OF NORTHFIELD; AND WASHINGTON ELECTRIC COOPERATIVE, INC.

WASHINGTON SUPERIOR COURT

DOCKET NO. S-412-85WnC

JUDGMENT

This action is before the court on summary judgment motions filed by each party in accordance with the August 8, 1986 Stipulation of the parties. Those motions were filed by the parties as follows:

Vermont Electric Cooperative, Inc., on September 22, 1986;
Villages of Ludlow, Lyndonville, Morrisville, Northfield and Washington Electric Cooperative, Inc., on September 22, 1986.
Massachusetts Municipal Wholesale Electric Co., Washington Electric Cooperative, Inc., and the Villages of Lud-

low, Lyndonville, Morrisville, and Northfield on September 22, 1986.

Department of Public Service on September 22, 1986; and

Village of Stowe on September 23, 1986.

FINDINGS OF FACT

1. On September 19, 1986, the parties filed a Stipulation of Facts. This was filed pursuant to Paragraph 6 of the August 8, 1986, Stipulation. This court finds as fact those facts so stipulated. A copy of the Stipulation of Facts is attached as an Appendix to this Judgment. Any reference herein to an exhibit means an exhibit stipulated to as part of the Stipulation filed September 19, 1986.

2. In 1979, the "Participants", twenty-two (22) Massachusetts municipal electrical utilities and six (6) Vermont utilities (parties to this litigation), entered into a set of Project No. 6 Power Sales Agreements (PSAs), with Massachusetts Municipal Wholesale Electric Company (MMWEC). Under these PSAs, MMWEC was to participate in the financing and construction of the Seabrook Nuclear Power Plant in Seabrook, New Hampshire, and the Participants by making payments to MMWEC became entitled to a fraction of the power generating potential (project capability) of Seabrook.

3. In this litigation, plaintiff raises the question of whether the Vermont participants could lawfully commit themselves to the terms of these PSAs.

4. Subsequent to the filing of the complaint, the Village of Stowe and the Vermont Electric Cooperative, Inc., without objection from any party and with court approval have been denominated as plaintiffs.

5. The PSA is set forth in full as Exhibit 42. Relevant provisions therefrom are as follows:

1. Definitions.

. . .

(q) "Project Capability" means the amounts of electric capacity and energy, if any, which the Project is capable of producing at any particular time (including times when the Project is not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses, and shall be determined in accordance with the New England Power Pool Agreement, if any, and otherwise in accordance with Prudent Utility Practice.

. . .

2. Term of Agreement.

This Agreement shall be effective upon execution and delivery of Power Sales Agreements by MMWEC and Participants whose Participants' Shares total 100.0%. This Agreement shall terminate when (i) all of the Facilities have been terminated as provided in Section 10 of this Agreement, (ii) the principal of and premium, if any, and interest on all of the Bonds have been paid or funds set aside for the payment or retirement thereof in accordance with the Bond Resolution and (iii) all other obligations and liabilities hereunder have been paid or provided for.

3. Financing, Design, Acquisition, Construction, Operation and Maintenance of the Project.

(a) MMWEC, in good faith and in accordance with Prudent Utility Practice, shall, subject, however, in the case of any jointly owned Facility, to the provisions of the applicable ownership agreement between the owners

of the Facility, use its best efforts: (i) to arrange for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the Project; (ii) to obtain, or arrange for obtaining, permits and other rights and regulatory approvals necessary for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the Project; and (iii) to issue and sell Bonds to finance the Costs of Acquisition and Construction of the Project, and to finance the costs of any necessary renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project, not otherwise provided for, *provided*, that in each such case Bonds may then be legally issued and sold.

. . .

5. *Payments by the Participant; Sources of Such Payments.*

. . .

(c) The Participant shall not be required to make any payments to MMWEC under this Agreement except from the revenues and other moneys derived by the Participant from its electric department or system. The Participant covenants and agrees that it will fix, revise and collect fees or charges for electric power and energy and other services, facilities and commodities sold, furnished or supplied through its electric department or system at least sufficient to provide revenues adequate to meet its obligations under this Agreement and to pay any and all other amounts payable from or constituting a charge and lien upon such revenues, including amounts sufficient to pay the principal of and interest on all bonds issued by the Participant for electric purposes.

(d) The Participant shall make the payments to be made to MMWEC under this Agreement whether or not the Project or any Facility thereof is undertaken, completed,

operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of the Project or any Facility thereof for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance by MMWEC or any other Participant under this or any other agreement or instrument, the remedy for any nonperformance being limited to mandamus, specific performance or other legal or equitable remedy.

(e) The Participant shall not have the right to challenge any bill, invoice or statement rendered by MMWEC, invoke arbitration of the same or bring any court or administrative action of any kind questioning the propriety of the same after a period of twenty-four months from the date of rendering. In the case of a bill, invoice or statement containing estimates, the Participant shall not have the right to challenge its accuracy after a period of twenty-four months from the date of its adjustment to reflect the actual amounts due.

(f) The Participant shall not issue bonds, notes or other evidences of indebtedness payable from and secured by a lien on the revenues derived from the ownership or operation of its electric system without providing for the payment of operating expenses (including Monthly Power Costs hereunder) from such revenues ahead of debt service on such bonds, notes or other evidences of indebtedness unless . . .

12. Obligations in the Event of Default.

. . .

(d) Upon failure of any other Participant(s) to make any payment which failure constitutes a default under this Agreement, and except as transfers are made pursuant to paragraph (c), the Participant's Share shall be automatically

increased for the remaining term of this Agreement pro rata with that of the other non-defaulting Participant(s) and the defaulting Participant's(s') Share(s) shall be reduced correspondingly; *provided,* that no such reduction shall reduce the defaulting Participant's(s') obligations under paragraph (e); and further *provided,* that the sum of such increases for the Participant pursuant to this paragraph shall not exceed, without consent of the Participant, an accumulated maximum of 25% of the Participant's Share prior to any such increases.

. . .

18. Arbitration.

Any dispute under this Agreement shall be submitted to arbitration at the request of either MMWEC or the Participant. . . .

19. Applicable Law.

This Agreement is made under and shall be governed by the law of the Commonwealth of Massachusetts.

. . .

20. Severability.

If any section, paragraph, clause or provision of this Agreement shall be finally adjudicated by a court of competent jurisdiction to be invalid, the remainder of this Agreement shall be unaffected by such adjudication and all of the remaining provisions of this Agreement shall remain in full force and effect as though such section, paragraph, clause or provision or any part thereof so adjudicated to be invalid had not been included herein.

6. These PSAs are commonly referred to as "take-or-pay" contracts because they obligate the participants to make monthly payments on their pro rata shares of obligations under the PSAs whether or not they actually received electric energy. PSA paragraph 5(d) supra.

7. MMWEC's revenues consist primarily of payments to be made under PSAs for each project between MMWEC and the projects' participants. (Exhibit 7 at page 5.)

8. Under MMWEC's financing obligation it was to sell bonds consistent with the general bond resolution adopted August 26, 1976. (PSA paragraph 3(a)(iii); Exhibit 5.)

9. General Order No. 45 dated September 29, 1965, (Exhibit 34) requires that Vermont municipal and cooperative utilities give advance written notice of entering into any contract for the purchase of capacity in or energy from any electrical generating or transmission facility for ultimate consumption in Vermont. (Exhibit 34, Paragraph 1f).

10. The Vermont participants complied with General Order No. 45. (Stipulation, Paragraphs 35-44, 56).

11. The Public Service Board issued an Opinion dated September 29, 1965, in conjunction with General Order 45. (Exhibit 34). That Opinion stated in part:

. . .

> We find that the demand for electrical energy will be increasing rapidly in the State of Vermont in the foreseeable future. Consumption was 583,000,000 KWH in 1950. It increased to 745,000,000 KWH in 1955, 1,168,000,000 KWH in 1960, and 1,531,000,000 KWH in 1964. By 1975 it is reasonably estimated that consumption will increase to 2,900,000,000. The consumption in 1975 will be nearly quadruple the consumption of 1955.
>
> We find that the efficient and economical way to generate and transmit sufficient electrical energy to meet the increasing demand will be through the construction of large-scale facilities for generation and transmission. The technology of generation and transmission has been advancing rapidly in recent

> years. Generating units with a capacity of hundreds of thousands of kilowatts have become significantly more economical and efficient than units with a capacity in the tens of thousands. . . .

CONCLUSIONS OF LAW

Authority to Contract

Under 30 V.S.A. Section 4002, any cooperative or municipal electrical utility shall have

> . . .
>
> (2) Authority to act in participation with other such utilities in arranging for the purchase of supplies of capacity and energy from other utilities, either within or without the State of Vermont, including purchases from . . . public authorities;
>
> . . .
>
> (5) Authority to otherwise do all lawful acts and things necessary or incidental to the exercise of the authority granted in this chapter.

This statute was enacted in 1977 at a time when meeting future electrical power needs through economies of scale was recognized by electric utilities.[1]

Plaintiffs claim that this statutory provision is not enough to authorize the PSAs because under section 1q of the PSAs the participants may never receive any electric energy because of the "if any" provision in the definition of project capability. This argument was disposed of in *DeFazio* v. *WPPSS*, 679 P.2d 1316, 1338 (Or. 1984)

[1] For a background of New England electrical energy in the period leading up to the enactment of this statute, see the testimony in this action of Guy W. Nichols filed June 2, 1986.

> If a city may commit itself to a purchase at cost whatever a supplier using its best efforts can produce from facilities which will be financed in reliance on the city's contract, however small the production and however expensive the product turns out to be, then we see no reason why this authority stops at contracting to pay the cost if small and costly deliveries should turn out to be none at all.

There is nothing in section 4002(2) that requires the generating facility to be operational at the time of "arranging for the purchase of supplies of capacity and energy." It does not follow that since the PSAs anticipated a possibility that electric energy might not flow from the Seabrook facility, that that destroyed the authority of cooperatives and municipal electric utilities to enter into PSAs.

Plaintiffs claim that section 4002(2) does not authorize the PSAs because of 30 V.S.A. section 4006 which states:

> Notwithstanding any other provision of this chapter, nothing herein shall have the effect of, or be construed as altering, amending, or repealing the statutory purposes provided for by any statute enacted by the legislature of Vermont pertaining to the creation, establishment, or operation of municipal electric utilities or electric cooperatives.

Arranging for the purchase of supplies of capacity and energy, the very lifeblood of an electric utility, simply does not alter, amend or repeal any statutory purpose that this court is aware of pertaining to the creation, establishment, or operation of municipal electric utilities or cooperatives in Vermont.

Plaintiffs assert the enactment of 30 V.S.A. section 604 and section 5013(a) are inconsistent with the authority provided in

section 4002(2). Section 604 gives the City of Burlington and Village of Lyndonville express authority to enter into contracts like the PSAs "without regard to the operational status of a facility." Section 5013(a) which became effective in 1979 confers similar PSA type authorizations on member municipalities and cooperatives when contracting with Vermont Public Power Supply Authority (VPPSA). The Oregon Supreme Court rejected plaintiff's assertion in *DeFazio* v. *WPPSS*, 679 P.2d 1316, 1324 (Or. 1984).

> . . . [L]egislators alike would know that legal doubts alone could prove fatal to successful participation in any financing plan, however lawful it actually might be. It is perfectly sensible to meet such doubts by providing the desired statutory authority, whatever the prior authority might cover.

See also Note, *A Cry for Reform in Construing Washington Municipal Corporation Statutes*, 559 Wash. L. Rev. 653, 668, 670 (1984). Note, *Chemical Bank* v. *Washington Public Power Supply System; The Questionable Use of the Ultra Vires Doctrine to Invalidate Governmental Take-or-Pay Obligations*, 69 Cornell L. Rev. 1094, 1102 et seq. (1984).

Because of the court's conclusion that authority exists under 30 V.S.A., section 4002(2) for the cooperatives and municipal electric utilities to enter into the PSAs, it is unnecessary to embark upon a so-called Dillon's Rule analysis. (See *Valcour* v. *Village of Morrisville*, 104 Vt. 119, 129 (1932)).

Similarly in view of 30 V.S.A. 4003(5) this court concludes that there has been no improper delegation to utility management responsibility as a result of the PSAs.

Plaintiffs suggestion that MMWEC is a mere conduit is disposed of in *DeFazio, supra*, at page 1328 as follows:

> The commitment of an agency's long-term contract as security, even as the sole security, for financing a building, a power plant, or another source of supply dedicated to the agency's use does not turn WPPSS or any otherwise independent supplier into a "dummy corporation" of the contracting agency. WPPSS was used as the vehicle for building thermal generating projects for the participants precisely because it already had an independent existence and bonding capacity.

The next challenge by plaintiffs to the PSAs that the court will consider is whether there was non-compliance by the participant municipalities with 24 V.S.A. section 1822. Stripped to its bare essentials, that statute reads in part:

> A municipal corporation which may . . . operate . . . any public utility may also, by action of its legislative branch, . . . have the power . . . to provide for or to secure the payment for . . . operating . . . by pledging, assigning, or otherwise hypothecating . . . net earnings or profits . . . from the operation. . . .

Plaintiffs claim that the PSAs are invalid for want of voter approval under the remainder of section 1822 which states:

> . . . To that end the legislative branch of such municipal corporation shall have full power to authorize and direct the execution and issuance of contracts and evidences of indebtedness as may be necessary to carry out the provisions of this subchapter. Such contracts and evidences of indebtedness shall be in such form, shall contain such provisions and shall be

> executed as may be determined by the legislative branch. Nevertheless, no such indebtedness shall be incurred nor evidence thereof be issued nor shall such revenues be pledged, assigned or otherwise hypothecated by the legislative branch of any municipal corporation herein described unless and until at least a majority of the legal voters of such municipal corporation present and voting at a duly warned meeting, called for that purpose, shall have first voted to authorize the same.

The court concludes that the only kind of transaction under section 1822 that requires voter approval are those municipal utility payment obligations which are provided for or secured by an actual pledge, assignment, or hypothecation of net earnings or profits of the utility. Language in section 1822 following the first sentence relates back to pledge, assignment, or hypothecation transactions. For example, the beginning of the next sentence states "To that end." "That" refers to the end by which payments are provided for or secured by pledging, assigning, or otherwise hypothecating net earnings or profits. The third sentence of section 1822 starts "such contracts and evidence of indebtedness." The "such" refers to "contracts and evidence of indebtedness" in the second sentence of that action. As the court has stated, the second sentence operates, " to that end." The fourth sentence states, "nevertheless, no such indebtedness." "Such indebtedness" refers to that indebtedness in the second and third sentences of the section. Therefore, there is nothing in section 1822 that triggers that section unless there is a pledge, assignment, or hypothecation in fact.

In order to create a valid pledge, "the pledgee must take possession of the things pledged." *Coty* v. *Barnes* 20 Vt. 78, 81 (1847), *Island Pond Nat. Bank* v. *Lacroix* 104 Vt. 282, 295-296. Unde the PSAs, MMWEC simply does not have pos-

session of present or future ratepayer payments to the participants. Therefore, there has not been a pledge of such revenues.

In order to create a valid assignment, the assignor must deliver to the assignee, "full control of the fund beyond the reach of any contrary directions of the assignor." *Twin Valley Motors, Inc.* v. *John Morale*, 136 Vt. 115, 118 (1978). Under the PSAs, the participants earmark the source of payments due from them as being future revenues from their electric departments or systems. PSA paragraph 5(c) supra. An earmarking of the source falls well short of a deliverance of the participants of "full control" of such future revenues to MMWEC.

To hypothecate means to pledge property as security or collateral for a debt. Generally, there is no physical transfer of the pledged property to the lender; nor is the lender given title to the property; though he has the right to sell the pledged property upon default. Black's Law Dictionary, 5th Ed. 669; *Taylor* v. *Hudgins*, 42 Tex. 244, 247 (1875)

MMWEC certainly has the right to sell participant revenues upon default. The PSAs do not hypothecate revenues of participants so as to create either security or collateral for the benefit of MMWEC. With respect to the participants' revenues, MMWEC does not have either security or collateral different from that of a general creditor.

Therefore, with respect to Section 1822, that part of Section 5(c) of the PSAs which refers to "revenues and other monies derived . . . from its electric department or system" does not amount to a pledge, assignment, or other hypothecation by the participants. Furthermore, because the hypothecation clause of Section 1822 is not triggered by the PSAs, the court need not reach the "net earnings or profits" clause of that section. It simply notes in passing that the payments by participants in MMWEC under the PSAs are treated from an accounting standpoint as purchase power payments which are expenses allocable to gross revenues and not net earnings or profits. Stipulation of Facts, paragraphs 27 and 28, Exhibits 25-30.

This court will not lightly disregard an industry accounting practice or presume that a particular accounting technique was employed simply to get around a statutory section such as 1882 as plaintiffs may have suggested.

30 V.S.A. Section 3032 provides:

> A cooperative may not otherwise sell, mortgage, lease or otherwise dispose of or encumber all or a substantial portion of its property unless such sale, mortgage, lease or other disposition or encumbrance is authorized by the affirmative vote of not less than a majority of all the members of the cooperative. . . ."

The terms dispose of or encumber must be construed with reference to the prior terms. When an enumerated list in a statute is followed by a general term it must be construed to include only those terms which are similar in nature to the specific enumerated terms. *Langle* v. *Kurkle*, Vt. S. Ct., Docket No. 82-254 (Slip Op.) filed 1/24/86 at 2. "Sell, mortgage, lease" denote the granting of an interest in property. In the PSAs no interest in the revenues of the participants is given. The participants simply agree to raise sufficient revenues to pay their PSA obligations out of those revenues.

The Vermont participants have not guaranteed repayment of MMWEC issued bonds. PSAs represent an unsecured obligation to make payments in the future. Such obligations have been held not to constitute an encumbrance where no mortgage or lien is given and no specific asset is made available to satisfy the debt. *Jones* v. *Hawaiian Electric Co.*, 639 P.2d 1103 (Ha. 1982), (30-year lease puchase agreement not an encumbrance requiring commission's prior approval.)

30 V.S.A. Section 108(a) provides in part:

> A domestic corporation subject to the jurisdiction of the public service board shall not mortgage nor pledge

> any of its corporate property nor issue any stocks, bonds, notes or other evidences of indebtedness or change its shares as provided in section 270 of Title 11 without the consent of the public service board given on petition and after hearing of the corporation or its incorporators and a finding of the board that the proposed action will be consistent with the general good of the states. . . .

Insofar as section 108 prohibits a pledge or mortgage of corporate property without approval, this court's reasoning with respect to section 1822 and section 3032 is applicable. With respect to the prohibition of issuing stocks, bonds, notes or other evidence of indebtedness, the court concludes that these provisions do not encompass thue contractual obligations of the participants in the PSAs. *Jones* v. *Hawaii Electric Co.*, *supra*.

The PSA is entitled *Power Sales* Agreement. The first page of the PSA identifies the purpose of the PSA as simply for (1) MMWEC to obtain an ownership interest in the Seabrook project, (2) MMWEC to sell project capability and (3) participants to purchase project capability. As stated in finding 5, project capability is electric capacity and energy, if any.

These words, "if any," do not doom the transaction. They simply recognize that this massive financial and physical project called Seabrook not only might not succeed but also, and more important, would never even be undertaken unless the costs of the effort, whether successful or not, were provided for by those choosing to participate (the participants) in this risk. The PSA does not purport to be risk-free, nor does the Vermont authorizing statute (30 V.S.A. section 4002 (2)) require that it be so in arranging for the purchase of supplies of capacity and energy.

Section 108 also states . . . "But such corporation may issue evidences of indebtedness payable within one year from the

date of issue without such consent provided *such borrowing* is necessary . . ." The fact that the Vermont participants might have borrowed money to build generating facilities instead of entering into the PSAs does not somehow convert the PSA obligations into a borrowing or loan transaction.

STEP-UP PROVISION

Plaintiffs claim that the so-called step-up provision of section 12(d) of the PSAs requiring a participant to assume a portion of a defaulting participant's obligation also violated 24 V.S.A. section 1822 and 30 V.S.A. section 3032.[2] In *DeFazio* v. *WWPPS, supra*, at page 1342 the court looked at a similar provision and stated:

> Insofar as the step-up clause covers assumption of a defaulting participant's share in the "dry hole" risk, that is to say, in the eventuality of a total failure of the projects, it may be argued to be a "guarantee" of the defaulting participant's debt rather than purchase of an increased share of project capacity such a guarantee may be beyond the city's respective authorities.

The court, however, left the question open by reasoning the step-up clause constituted a contingent promise to take an increased share of power or power capability, which would not necessarily be an impermissible guarantee "at the time of contract." *Id.*

The court noted that:

---

[2] For general background information on the step-up provision and the financing of so-called joint action projects involving "take-or-pay" provisions, see the pre-filed testimony of Eugene W. Devlin, filed June 2, 1986.

> Whether there are defenses arising out of developments subsequent to the cities and districts' initial entry into the agreements is not before us in this appeal.

That reasoning is equally applicable to the Vermont participants. There has been no showing of any step-up thus far. The non-occurrence of a default condition may discharge a step-up duty. Restatement, Second, Contracts section 225. Any additional obligation incurred by a Vermont participant as a result of section 12(d) may or may not result in additional energy being supplied to that participant. Somewhat analogous to this situation is the proposition that where a contract could have been performed in a legal manner as well as an illegal manner, it will not be declared void because it might have been performed in an illegal manner. 17 AmJur2d Contracts section 159.

PSB RATEMAKING POWERS

Plaintiffs claim that section 5c and 5f of the PSAs have the legal effect of forcing the PSB to approve utility rates of the participants in order to avoid breach of contract by the participants of those sections and that such forcing of the PSB in effect usurps the ratemaking authority of the PSB. By agreeing to collect revenues sufficient to meet their obligations under the PSAs, plaintiffs argue that the utility deny the PSB the alternative of prospectively reviewing matters for which rate increases are sought. The defendants say that PSB ratemaking is an implied term of the PSAs and that the PSAs do not purport to deny that function.

The existence of the PSAs may be a factor in the PSB's decision. The parties are dependent on rates to pay their obli-

gations under the PSAs. Therefore, if a sufficient rate is not allowed, the obligation may not be paid.

Nothing has been shown by plaintiffs to suggest that the PSB could not deny rate requests of a participant even if it meant the inability of a participant to meet its PSA obligations. The PSA does not usurp the ratemaking powers of the PSB.

CONSTITUTIONAL VIOLATIONS

Plaintiffs' claims under the 5th and 14th Amendments to the United States Constitution relating to ratepayers' right to due process are not clear. Absent state action, a claim under these provisions cannot succeed. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 349-350 (1974). 16 AmJur2d, Constitutional Law, section 822.

Even if the PSAs are somehow state action, the plaintiffs have not shown a cognizable property interest which has been "taken". Any rate increases resulting from the PSA obligations are subject to PSB review with notice and opportunity for hearings. 30 V.S.A. section 225, 226.

Plaintiffs also claim that the PSAs violate Chapter I, Articles 1, 2, 4 and 9 of the Vermont Constitution. Plaintiffs claim interference with ratepayer rights as citizens to be protected in the enjoyment of their property and to have recourse to the law when they are not. The cited provisions of the Vermont Constitution simply do not confer on ratepayers a right to successfully challenge every "bad deal" undertaken by utility management. Any "bad deal" may cost ratepayers money. This court having concluded that the statutory rights of ratepayers have not been abridged by the PSAs and that procedural due process requirements are met by existing rate-making safeguards, it declines to apply the Vermont Constitution as plaintiffs request.

Plaintiffs also claim that the PSAs resulted in taxation without public benefit contrary to Chapter I, Article 9 of the Vermont Constitution.

Because rates are like taxes, the argument goes, Chapter I, Article 9 should apply. In *DeFazio* v. *WWPPS, supra*, 1332-33, the court rejected a similar argument in a different context.

> We do not accept the opponents' argument that utility rates in fact are equivalent to taxes because they have a comparable economic impact on ratepayers. Any charge for a public service reduces the user's disposable funds much as taxes do; . . . Charges for these necessities are not inescapable in the same sense as taxes are. This is what makes general obligation debt preferable to creditors and correspondingly cheaper. At some point it may become too expensive to drive or park a car, to attend a college, to water a lawn; and it also is possible to reduce one's consumption of electricity to substitute another fuel, or in the case of a plant or institution, perhaps even to generate one's own eletricity. If an unforeseen event prices too many users out of the market for the service, the creditor also loses the only source of repayment. In equating a commitment of future rates, expensive as it may prove to be, to a pledge of future taxes, the opponents simply attack the "special fund" premise of this long-established line of decisions in another way.

The inescapability of taxes distinguish them from rates. Plaintiffs have not suggested any compelling authority for the proposition that the Vermont Constitution should apply to rates as well.

Article 9 speaks to tax laws. This action challenges contracts, the PSAs. Because contracts are not laws Article 9 is not apposite.

ONE HUNDRED PERCENT PARTICIPATION ISSUE

It appears to the court that the Plaintiffs' claim of lack of 100% participation in the PSAs is dependent on Plaintiffs prevailing in one or more of the issues hereinabove disposed of. Inasmuch as plaintiffs did not so prevail, their claim on the 100% participation issue is without merit.

ORDER

Based upon the findings of fact and conclusions of law, it is hereby ORDERED AND ADJUDGED that:

1. The parties in this litigation that are participants in the Massachusetts Municipal Wholesale Electric Company Project No. 6 Power Sales Agreement had statutory authority to enter into these Power Sales Agreements.

2. These Project No. 2 Power Sales Agreements do not constitute an unlawful delegation of authority by the Vermont participants.

3. The Project No. 6 Power Sales Agreements do not violate Vermont statutory law on incurring debt or issuing evidences of indebtedness.

4. The Project No. 6 Power Sales Agreements are not a pledge, assignment, or hypothecation of all or any part of the net earnings or profits of the Vermont participants.

5. The Project No. 6 Power Sales Agreements did not require voter approval of the participating Vermont municipalities or member approval of the participating Vermont Cooperatives.

6. The Project No. 6 Power Sales Agreements did not require approval of the Vermont Public Service Board under 30 V.S.A. section 108.

7. The Project No. 6 Power Sales Agreements do not contravene the ratemaking authority of the Vermont Public Service Board.

8. The Project No. 6 Power Sales Agreements do not deprive the Vermont participants of any rights secured to them under the Vermont or United States Constitutions.

9. Count 11 of Plaintiffs' Complaint is DISMISSED.

The court determines that there is no just reason for delay of entry of final judgment as to the issues hereinabove adjudicated, and accordingly, as to those issues, the court hereby directs that entry of final judgment be made.

DATED: November 26, 1986 _____

JOHN P. MEAKER, Superior Judge

Supreme Court, U.S.
FILED
JUN 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1769

In The

Supreme Court of the United States

October Term, 1988

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,

Petitioner,

v.

VERMONT DEPARTMENT OF PUBLIC SERVICE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Vermont

BRIEF OF APPELLEE VILLAGE OF STOWE IN OPPOSITION TO THE PETITION OF MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY

*Edward B. French, Jr.
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June 7, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Should Massachusetts Municipal Wholesale Electric Company, the Petitioner in this case, be permitted to raise federal constitutional claims against the Village of Stowe before this Court when those claims were not raised before the State of Vermont trial court?

2. Did the Vermont Supreme Court deny any due process rights of the Petitioner when it determined that the Power Sales Agreements between Massachusetts Municipal Wholesale Electric Company and the Vermont participant municipalities were void *ab initio* under the pre-existing statutory and common law of the State of Vermont?

3. Did the Vermont Supreme Court discriminate against the Petitioner's rights under the Commerce Clause when it applied the neutral statutory and common law of the State of Vermont to find that the Power Sales Agreements between Massachusetts Municipal Wholesale Electric Company and the Vermont municipalities were void *ab initio*?

4. Should a Writ of Certiorari be granted in this case when the Supreme Court has previously refused to grant Certiorari in cases involving identical issues decided by the State of Washington Supreme Court?

PARTIES TO THIS PROCEEDING

The Petition for Certiorari describes the parties to this proceeding. This Brief in Opposition to the Petition for Certiorari is being filed on behalf of the Village of Stowe, one of the Respondents.

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Prune Yard Shopping Center v. Robbins, 447 U.S. 74 (1980) 6, 7

Webb's Fabulous Pharmacy, Inc. v. Beckwith, 449 U.S. 155 (1980) 8

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STATEMENT OF THE CASE

The Petitioner has presented a Statement of the Case setting forth the general background of this action. The Village of Stowe finds it necessary, however, to bring some corrections and additions to the Court's attention.

MMWEC does not clearly identify the precise involvement of the Village of Stowe in this case. Stowe did not execute a Power Sales Agreement directly with MMWEC. Instead, it entered into a Power Sales Contract with the Village of Morrisville, through which it assumed responsibility for all of Morrisville's obligations in connection with a portion of the project capability purchased by Morrisville from MMWEC. Since the Power Sales Contract fully incorporated the terms of the Power Sales Agreement, Stowe became indirectly responsible for payments to MMWEC. Morrisville forwarded all of Stowe's payments for Seabrook project capability directly to MMWEC.

The Petitioner has made certain general statements concerning the widespread reliance by utilities upon so-called "take-or-pay" contracts. (Petition for Certiorari, pp. 6,8). There is an implication that take or pay contracts generally impose obligations which are identical to those contained in MMWEC's Power Sales Agreements. It is the position of the Village of Stowe that contracts containing provisions such as those set out in the Agreements at issue here are very rare in the State of Vermont. In any event, this issue was never dealt with on an evidentiary level in the Vermont Courts. The trial court decided the case on the basis of a legal question: whether the Power Sales Agreements were void as a matter of law. Certain

other contracts had been pleaded in the case, but there was never an analysis of those contracts or a comparison of their terms with those of the Power Sales Agreements. The Supreme Court of Vermont properly pointed out that neither the defendants' concern about the existence of identical contracts nor the plaintiffs' emphasis on the immensity of financial burden imposed by the agreements were proper considerations in connection with that Court's decision. (Petition for Certiorari, Appendix A, pp. 22A 23A).

In its Statement, MMWEC has also asserted that the Power Sales Agreements do not grant MMWEC a security interest in any funds or property of the participants (Petition for Certiorari, p. 7). In the courts below, the Respondents asserted that the Power Sales Agreements did indeed create a security interest. This issue never had to be reached by the Vermont Supreme Court (Petition for Certiorari, Appendix A, p. 22A). This Court should not be misled by an assertion that there was no security interest created, when the matter was never resolved by the state courts.

MMWEC mistakenly claims that the Vermont Public Service Board undertook an "approval of the PSAs" (Petition for Certiorari, p. 9). The General Order No. 45 process involves a filing so that the Vermont Public Service Board has an opportunity to review proposed contracts, not any necessary approval process. The evidence in this case demonstrated that the Agreements were filed with the Board by Stowe and other Vermont municipal participants in accordance with General Order No. 45. There was, however, no order approving the Village of Stowe's involvement in the obligations created by the Power Sales

Agreements, as they were incorporated into the contract between Stowe and the Village of Morrisville.

In describing the present litigation, MMWEC neglects to point out that the Village of Stowe moved for, and obtained, intervention as a plaintiff in this case below. As part of its Motion for Intervention, Stowe served a Complaint against MMWEC. Since MMWEC never responded to this Complaint, it did not raise its federal affirmative defenses against the Village of Stowe.

SUMMARY OF ARGUMENT

The Village of Stowe opposes the request made by Massachusetts Municipal Wholesale Electric Company for a Writ of Certiorari to the Supreme Court of Vermont to determine whether that Court unconstitutionally foreclosed the presentation of MMWEC's affirmative federal law defenses in the State proceedings below.

The Village of Stowe's initial objection is based upon a procedural ground. Although MMWEC vigorously defended the action below, at no time did it specifically file an answer to the Complaint of the Village of Stowe in this case. The affirmative defenses upon which it relies were therefore never properly raised against the Village of Stowe. This Court has no procedural basis to undertake a review of the federal constitutional issues raised by MMWEC.

MMWEC's substantive argument relies upon the Due Process Clause and the Interstate Commerce Clause of the United States Constitution. There could have been no

violation of the Due Process Clause, as asserted, because MMWEC never owned any recognizable property interest. The Vermont Supreme Court determined that the Power Sales Agreements were void *ab initio* under a clear interpretation of Vermont statutory law enacted prior to execution of the Agreements. MMWEC never possessed any reasonable investment-backed expectations.

There was furthermore no violation of the Commerce Clause. A nondiscriminatory Vermont statute was in effect prior to execution of the MMWEC Power Sales Agreements. MMWEC gained no contractual rights because the Agreements were in violation of the existing statute. It cannot now claim discrimination under the Commerce Clause in an effort to circumvent its obligations under state law.

ARGUMENT

I. MMWEC'S FAILURE TO RAISE FEDERAL AFFIRMATIVE DEFENSES AGAINST THE VILLAGE OF STOWE IN THE PROCEEDINGS BELOW PRECLUDES ITS ABILITY TO RAISE THOSE DEFENSES BEFORE THIS COURT.

In its Petition for Certiorari, MMWEC refers to the Village of Stowe as "an intervenor". (Petition for Certiorari, P. iii) This reference makes it clear that MMWEC has an understanding of the nature of Stowe's involvement in this case. The Vermont Rules of Civil Procedure provide for a right of intervention upon filing of an application to intervene and a pleading setting for the claim or defense for which intervention is sought. V.R.C.P. 24. The Motion to Intervene must be served upon

the other parties in the case in accordance with V.R.C.P. 5. Rule 5 requires service of all documents in an action upon the other parties by mail or personal delivery.

The docket sheet of the Washington Superior Court in this case, attached as Exhibit A to this Brief, indicates that the Village of Stowe filed a Motion to Intervene in the action on October 28, 1985. A copy of the motion filed is attached hereto as Exhibit B. The Village of Stowe included a copy of its Complaint with the Motion to Intervene. The Washington Superior Court issued an Order permitting intervention on November 18, 1985. This Order was served upon all parties to this action.

Neither the docket sheets of the Washington Superior Court nor the actual court files contain any evidence that MMWEC ever filed an answer to the Complaint brought by the Village of Stowe. MMWEC's Answer, relevant portions of which have been attached as Appendix E to its Petition for Certiorari, was filed in response to the Complaint of the Vermont Department of Public Service only.

V.R.C.P. 12(b) mandates that a responsive pleading shall assert every defense, in law or fact, to a claim for relief brought by the opposing party. Defenses which are not raised in a responsive pleading are waived. *In re Stocker*, 133 Vt. 161, 163 (1975).

MMWEC has no grounds to raise its federal constitutional defenses against the Village of Stowe before this Court, since those defenses have long since been waived by MMWEC's failure to answer Stowe's Complaint in the context of the lower court proceedings.

II. INVALIDATION OF THE POWER SALES AGREEMENTS DID NOT DEPRIVE MMWEC OF ANY PROPERTY INTEREST IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Village of Stowe's obligation to pay a portion of the MMWEC "project capability", purchased through the Power Sales Agreement between the Village of Morrisville and MMWEC, was invalidated by the Vermont Supreme Court on the basis of the language contained in 30 V.S.A. §4002. This statutory provision authorized Stowe to undertake the purchase capacity and energy, but not to enter into the unconditional long-term obligations associated with "project capability." (Petition for Certiorari, Appendix A, p. 7a.) Due to the fact that there were other statutory sections applicable to some of the Vermont utilities, the Vermont Supreme Court also concluded that the Power Sales Agreements involved an impermissible delegation of power. Since there were no other statutory provisions applicable to the Village of Stowe, the decision on Section 4002 fully disposed of Stowe's claims.

Both the provisions of 30 V.S.A. §4002 and the delegation doctrine existed prior to execution of the Power Sales Agreements in 1979. In order to demonstrate a deprivation of property in violation of the Due Process Clause of the Fourteenth Amendment, MMWEC must show that there has been an "interference with reasonable investment-backed expectations." *Prune Yard Shopping Center v. Robbins*, 447 U.S. 74, 83 (1980). In order to have investment-backed expectations of any sort under the Due Process Clause, the party asserting a violation of Due Process

must, in the first instance, have an established property interest.

In the *Prune Yard* case, cited by MMWEC in support of its Petition, the Due Process question arose from a prohibition against the dissemination of political literature in a shopping center. There was no dispute in that case about the existence of a basic property interest in the owner of the shopping center. The question, instead, involved a secondary inquiry: whether the State court's declaration of a right to disseminate literature in a shopping center involved a "taking" of a property interest under the United States Constitution.

The secondary inquiry is not even reached in the instant case, since the Petitioner never possessed the basic initial property interest. Under the established law of the State of Vermont at the time when the Power Sales Agreements were entered into, there was no authority by the Vermont participants to execute or carry out the terms of the Agreements. MMWEC never received a property interest which could later be "taken" or otherwise affected by government action.

In the case of *Armstrong v. United States*, 364 U.S. 40 (1960), also relied upon by MMWEC, the necessary prerequisite property interest not present in this case was specifically recognized by the Supreme Court: ". . . Petitioners had valid liens under Maine law against both the hulls and whatever unused materials which Petitioners had furnished," *Id.* at 46. The *Armstrong* Court concluded that the property interest established under state law had been wrongfully taken by the United States

Government without compensation. *Id.* at 48-9. If the property interest had not existed, the case holding would have been necessarily different.

MMWEC's reliance in this case upon *Webb's Fabulous Pharmacy, Inc. v. Beckwith*, 449 U.S. 155 (1980), is similarly ill-founded. The Court in *Webb's* clearly accepted the Florida Supreme Court reading of the statute, stating that that reading was "within the Florida Court's competency, and we must take the statute as so read and interpreted," *Id.* at 160. In fact, the *Webb's* case analysis precedent squarely mandates denial of the Petition for Certiorari requested in this matter.

In the case of *Home Building & Loan Association v. Blaisdale*, 290 U.S. 398, 448 (1934), the Court pointed out that a state:

> continues to possess authority to safeguard the vital interest of its people. . . . This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.

Rather than offering "remarkably little Vermont precedent for its reasoning," as the Petitioners in this case allege (Petition for Certiorari, p. 16), the Vermont Supreme Court has cited a clear statute and a legal doctrine in existence at the time when the Power Sales Agreements were executed. This Court should accept the Vermont Supreme Court's conclusion and deny the requested Petition for Certiorari.

III. INVALIDATION OF THE POWER SALES AGREEMENTS DOES NOT BURDEN OR DISCRIMINATE AGAINST MMWEC'S ACTIVITIES IN INTERSTATE COMMERCE.

In order to analyze MMWEC's claim that invalidation of the Power Sales Agreements discriminated against MMWEC's activities in interstate commerce, it is necessary to review the provisions of the statute relied upon by the Vermont Supreme Court to invalidate the Village of Stowe's obligation to pay for Seabrook project capability. 30 V.S.A. §4002 provides, in relevant part, as follows:

> Any cooperative or municipal electric utility shall have:
>
> . . . .
>
> (2) authority to act in participation with other such utilities in arranging for the purchase of supplies of capacity and energy from other utilities, either within or without the State of Vermont, including purchases from private electric utilities, municipal electric utilities, cooperatives, associations of utilities, or public authorities. . . .

In its opinion, the Vermont Supreme Court stated that "supplies of capacity and energy" were not equivalent to the vastly open-ended concept of "project capability" (Petition for Certiorari, Appendix A, P. 7a).

The Commerce Clause protects persons against discriminatory state regulation. The applicable standard for review of a state statute is set out in the case of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where a statute regulates even-handedly to effectuate a legitimate local interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is

clearly excessive in relation to the putative local benefits.

There is no economic protectionism of any sort embodied in the terms of 30 V.S.A. §4002(2). It would be difficult to find a more even-handed statute. Vermont utilities have the right to arrange for the purchase of supplies of capacity and energy from any utilities, whether or not those utilities are located in the State of Vermont. The class of utilities is expansive, including private electric utilities, municipal electric utilities, cooperatives and others.

The invalidity of the Power Sales Agreements arises from the limits which Section 4002 places on the authority of all utilities, both those within and outside Vermont. There is no precedent for compelling a state to expand the scope of its statutory provisions to permit special benefits for a utility which happens to be located outside the state. The limitations of Section 4002 apply to all utilities, wherever they are located. There is no discrimination against interstate commerce. Section 4002 can fairly be viewed as a law directed to legitimate local concerns. with effects upon interstate commerce that are only incidental. *Pike*, at 142.; *See also Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Recognizing the basic weakness of its Commerce Clause claim, MMWEC has attempted to obscure the issue by attacking the validity of the Vermont Supreme Court decision which interpreted the statute. MMWEC is well aware, as footnote 5 of its argument shows, that there is no precedent for overturning a state court's reasonable interpretation of state statutory or common law. As the Supreme Court stated in *Great Northern Railway*

Company v. Sunburst Oil & Refining Company, 287 U.S. 358, 365 (1932):

> The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their action.

The courts of the state have the supreme authority to interpret and declare the written and unwritten laws of the state, and the Supreme Court has long respected that right. *Brinkerhoff-Faris Company v. Hill*, 281 U.S. 673, 680 (1930).

The case of *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), relied upon by MMWEC, involved an existing statute which gave the residents of New Hampshire a preferred right of access, over out-of-state consumers, to natural resources located within the state boundaries. The Supreme Court overturned an order of the state commission, based upon the statute, which gave priority to state consumers over others. *New England Power Co.* obviously has no applicability to the present action, where the statute of the Vermont statute was neutral in its face and has been applied neutrally to all parties. The result would have been the same if MMWEC had been a Vermont, rather than Massachusetts, utility company. In fact, the Vermont participants who argued in favor of the Power Sales Agreements faired no better than MMWEC before the Vermont Supreme Court. They were also released from their obligations under the terms of the Power Sales Agreements.

MMWEC places great reliance upon the case of *Middle S. Energy, Inc. v. Arkansas Public Service Commission*,

772 F2d 404 (8th Cir. 1985), where the Eighth Circuit Court of Appeals upheld an injunction prohibiting the Arkansas Public Service Commission from invalidating contracts under which an Arkansas utility company sought to purchase project capability from an out-of-state power facility. The *Middle S.* case is clearly distinguishable from the present action, because the Arkansas court system had not considered the validity of the contracts. The Court of Appeals upheld an injunction against the Public Service Commission's vigorous advocacy efforts to nullify the obligations of Arkansas Power & Light Company under the contract.

In the course of its decision, the *Middle S.* Court recognized its understanding that the state courts of Arkansas could have properly ruled upon the validity of the contract. *Id.* at 413. An obvious corollary of this understanding is a recognition that the Arkansas courts' interpretation of state law questions would have been respected by the Court of Appeals. The Court of Appeals even considered the option of deferring to the state courts in connection with the issue of contract interpretation. It did not do so only because of the anticipated substantial delay and expense which would have been involved if such a deferral had been permitted. *Id.* at 413. One can only conclude from the *Middle S.* case that if the Arkansas courts had taken an action similar to that taken by the Vermont Supreme Court, the decision of the state court would have been fully respected by the federal court system.

The decision of the Vermont Supreme Court in this case does not involve discriminatory, protectionist action.

The State of Vermont's statute was interpreted in a manner which makes it even-handedly applicable to both in-state and out-of-state utilities. MMWEC is seeking to have this court grant it special rights because it happens to be a utility company located outside the State of Vermont. This sort of discrimination cannot be permitted under the guise of asserting rights under the Commerce Clause.

IV. A WRIT OF CERTIORARI SHOULD BE DENIED IN THIS CASE BECAUSE THE SUPREME COURT HAS ALREADY REFUSED TO GRANT CERTIORARI IN CASES FROM THE STATE OF WASHINGTON RAISING IDENTICAL ISSUES.

This case does not raise issues of first impression before this Court. Two prior cases dealt with the legality of power sales agreements, almost identical to those involved in this case, entered into by municipalities in connection with a nuclear power project owned by Washington Public Power Supply System. *Chemical Bank v. Washington Public Power Supply System*, 99 Wash. 2d 772, 666 P.2d 329 (1983) *(Chemical Bank I); Chemical Bank v. Washington Public Power Supply System*, 102 Wash. 2d 874, 691 P.2d 524 (1984) *(Chemical Bank II)*. The Washington Supreme Court had ruled that the agreements at issue in those cases were void under state doctrines of statutory authority and delegation of authority identical to those applied by the Vermont Supreme Court. The parties who did not prevail before the Washington Supreme Court applied to this Court for a Writ of Certiorari. This Court denied the request without comment. 471 U.S. 1075 (1985)

(Chemical Bank I); 471 U.S. 1065 (1985) *(Chemical Bank II).* In light of this precedent, there is no reason why the Court should grant Certiorari in this case.

V. CONCLUSION.

On the basis of the arguments which it has set forth in this Brief, the Village of Stowe asks this Court to deny the request of Massachusetts Municipal Wholesale Electric Company for a Writ of Certiorari to the Supreme Court of Vermont.

Respectfully submitted,

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APPENDIX

EXHIBIT A

Vol 114 P 66

STOWE, Village of – Intervenor-----Edward B. French, Jr.
P.O. Box 1016
Stowe, VT. 05672-1016

S-412-85 Wnc

VT. DEPT. OF PUBLIC SERVICE-----Michael Marks
Dinah Yessne
(Asst. Attys. Gen., 120 State Str.,
Montpelier, VT. 05602)

v.

MASSACHUSETTS MUNICIPAL WHOLESALE
ELECTRIC CO.----John Parker
– Out-of-state – Gerald J. Caruso

LUDLOW, Village of ..... Stephen C. Walke, Jr.
..... Ralph W. Howe, III
LYNDONVILLE, Village of....."
MORRISVILLE, Village of ....."
..... " William Piper
..... " Robert Mello
NORTHFIELD, Village of..... Peter J. Monte
..... Ralph W. Howe
VT. ELECTRIC
COOPERATIVE, INC. ..... Michael L. Burak
(95 St. Paul St., Burlington 05402)

WASHINGTON ELECTRIC
COOPERATIVE, INC. ..... Stephen C. Walke, Jr.
..... Ralph W. Howe, III

(Dec. & Injunctive Relief – Power Project)

1985

October 18

Complaint for Declaratory & Injunctive Relief dtd 10/18/85, First Set of Dept. of Public Service Requests to Admit Served on MA. Municipal Wholesale Electric Co., First Set of Dept. of Public Service Interr. & Requests to Produce to MA. Municipal Wholesale Electric Co., First Set of Dept. of Public Service Requests to Admit served on the Village of Ludlow, Lyndonville, Morrisville & Northfield & on the Vt. Electric Coop., Inc. & on the Washington Electric Coop., Inc. filed; Original Summons returned for signatures;

October 24

Summons filed by Special Asst. Atty. Gen. Dinah Yessne;

October 28

Mo. to Intervene, Memorandum of Law, Complaint for Declaratory & Injunctive Relief filed by Atty. French;

November 12

Mo. to Extend Time to Answer & Affidavit in Support of Mo. to Extend Time filed by Atty. Burak;

File given to Judge Morse for consideration on Mo. to Intervene and Mo. to Extend Time to Answer;

Notice of Appearance, Counterclaim Against the Vt. Dept. of Public Service & Answer to Counts I Through IX of the Complaint of the Vt. Dept. of Public Service of the Village of Ludlow, Village of Lyndonville, Village of Morrisville & Washington Electric Coop., Inc. with Exhibits A-W; Mo. of Ludlow, Lyndonville, Morrisville & WEC to Dismiss

Counts X through XIV of Pltf's Complaint & Memorandum in Support Thereof, Mo. of Ludlow, Lyndonville, Morrisville & Washington Electric Coop., Inc. for an Extension of Time Within Which to Answer Pltf's First Set of Interr., Requests to Produce & Requests to Admit with Incorporated Memorandum of Law; Mo. for Pre-Trial Conference, Deft Villages Ludlow, Lyndonville & Morrisville & WEC's First Request to Produce to DPS; Copy of letter to counsel re: proposed Stipulation for Discovery Schedule all filed by Attys. Walke & Howe;

COUNTERCLAIM

Vol 114 P 66

STOWE, Village of – Intervenor-----Edward B. French
P.O. Box 1016
Stowe, VT. 05672

S-412-85 Wnc

VT. DEPT. OF PUBLIC SERVICE-----Michael Marks/
Dinah Yessne
(Asst. Attys. Gen., 120 State St
Montpelier, VT. 05602)

v.

Ferriter & Barna, P.C., One Milk St., Boston, MA 02109

MASSACHUSETTS MUNICIPAL WHOLESALE
ELECTRIC CO.----John Parker
– Out-of-state – Gerald J. Caruso

LUDLOW, Village of ..... Stephen C. Walke, Jr.
..... Ralph W. Howe, III
LYNDONVILLE, Village of....."
MORRISVILLE, Village of ....."
.... " William B. Piper
.... " Robert A. Mello
NORTHFIELD, Village of..... Peter J. Monte

VT. ELECTRIC
COOPERATIVE, INC. ..... Michael L. Burak
(95 St. Paul St., Burlington 05401)

WASHINGTON ELECTRIC
COOPERATIVE, INC. ..... Stephen C. Walke, Jr.
..... Ralph W. Howe, III
..... Mary P. Kehoe

(Dec. & Injunctive
Relief – Power Project)

1985
November 27

Memorandum of Dept. of Public Service in Opposition to Mo. of Villages of Ludlow, Lyndonville & Morrisville & Washington Electric Cooperative, Inc. to Dismiss Counts X-XIV of its Complaint filed by Attys. Marks & Yessne;

December 2

Mo. of Vt. Electric Cooperative, Inc. for an Extension of Time Within Which to Respond to Pltf's First Set of Interrogatories, Requests to Produce and Requests to Admit, Mo. to Extend Time to Answer & Affidavit in Support of Motion to Extend Time to Answer filed by Atty. Burak;

Hearing on Motion for Extensions of Time-granted to 1/6/86; All motions ready for hearing set for 12/20/85 at 9:00 A.M. Morse, Jensen, Woodward, Judges;

December 3

Mo. of Defts Villages of Ludlow, Lyndonville & Morrisville & Washington Electric Cooperative, Inc. for Extension of Time Within Which to Respond to Dept. of Public Service's Mo. for Summary Judgment & Memorandum of Law in Support of Motion; Mo. of

(Dec. & Injunctive
Relief – Power Project)

1985
December 3

Defts Villages and WEC to Compel & Memorandum of Law in Support of Motion; & Mo. of Defts Villages & WEC for an Order Designating this Case as a Complex Action with Incorporated Memorandum of Law filed by Attys. Walke, Howe & Kehoe;

Letter to Judge Morse from Atty. Howe filed re: Motions;

December 4

Mo. of Villages of Ludlow, Lyndonville, Morrisville, & Washington Electric Cooperative, Inc. for Protective Order Re: First Set of Dept. of Public Services Interrogatories & Requests to Produce filed by Attys. Walke, Howe & Kehoe; (with exhibits)

December 5

Defts Villages of Ludlow, Lyndonville & Morrisville & Washington Electric Cooperative, Inc.'s Second Request to Produce and First Interrogatories to the Dept. of Public Service with Exhibits and Defts. Villages and WEC's First Requests for Admission to the Dept. of Public Service filed by Attys. Walke, Howe & Kehoe;

COUNTERCLAIM Vol 114 P 66

COMPLEX ACTION – S-412-85 Wnc
JUDGE MORSE ASSIGNED
VT. DEPT. OF PUBLIC SERVICE

vs

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC CO. et al.

(Dec. and Inj. Relief –
Power Project)
(SEE COVER PAGE FOR LIST OF APPEARANCES)

1985
December 20

Hearing on pending motions; Morse, Jensen, Woodward, Judges Mitchell Reisner, Reporter;
Northfield to Dismiss 11/12/85, withdrawn; Counsel for Northfield agreed to accept service;
Northfield to Strike 11/22/85 – Denied;
LLMW to Dismiss 11/12/85 – Under advisement;
LLMW for Discovery Conf – granted;
DPS to Dismiss Counterclaim 11/20/85 – under advisement
DPS to Srike 11/20/85 – Under advisement
DPS for Summary Judgment 11/20/85 – Hearing set for 1/17/86 at 1:00 P.M.
DPS for Expedited Consideration 11/20/85 – Granted;
LLMW for Designation as Complex 12/3/85 – Granted;
LLMW to Compel 12/3/85 – withdrawn;
LLMW to Extend 12/3/85 – Granted to 1/15/86;
LLMW Protective Order 12/4/85 – withdrawn;
VEC to Extend Time 12/13/85 – Granted to 12/20/85
MMWEL to Dismiss – set for hearing 1/17/86 at 1:00 P.M. Memo due by 1/15/86;
DPS to Compel 12/18/85 – withdrawn;
Morrisville for Pre. Inj. set for 1/2/86 at 9:30 A.M.
Transcript order of hearing on pending motions for 12/20/85 filed by Atty. Opel; Copy of request hand-given to Reporter Reisner;
Notice of Hearing for 1/2/86 hearing filed and copy hand-given to Mr. Mello;

December 23

Letter from Atty. Piper filed with attached Exhibits 1 & 2 to the Memo of Law in Support of Preliminary Inj. Mo., which were inadvertently left off from the Memo;

(Dec. & Injunctive
Relief – Power Project)

1985
December 24

Copies of letters from Reporter Reisner to Attys. Parker, French, Burak, Monte, Mello, Piper, Scobbo/Sikora and Marks/Yessne filed advising the cost for a copy of the transcript of the motions hearing held 12/20/85 is $30.00;

December 26

Dept. of Public Service Reply to Defts. Ludlow, Lyndonville, Morrisville & Washington Electric Cooperative's First Production Request filed by Attys. Marks and Yessne;

COUNTERCLAIM Vol 114 P 66

COMPLEX ACTION – JUDGE MORSE ASSIGNED
S-412-85 Wnc *RULE 5(d)*

VT. DEPARTMENT OF
PUBLIC SERVICE

vs

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC CO., ET AL

(Dec. and Inj. Relief –
Power Project)

(SEE COVER PAGE FOR LIST OF APPEARANCES)

1986
January 17

Mo. to Extend Time to Respond to Mo. for Summary Judgment filed by Atty. Burak;

Letter filed by Atty. Yessne in response to Atty. Howe's letter of 1/14/86;

(Dec. & Injunctive
Relief – Power Project)

1986

January 21

Copy of Subpoena, with Return of Service thereon, and attached Exhibit A, for Gerald R. Tarrant filed by Atty. Howe

January 22

Memorandum of Law, Mo. to Quash Subpoena & Reschedule Deposition & Certification filed by Atty. Marks;

January 23

Deft. Massachusetts Municipal Wholesale Electric Co.'s Mo. to Reschedule the Hearing of the Pltf's Mo. for Summary Judgment to a Time After the Court's Decision of the Pending Motions to Dismiss filed by Attys. Parker & Ferriter;

Memorandum in Opposition to Mo. to Quash Subpoena filed by Atty. Howe;

Reply of Village of Stowe to Village of Morrisville's Counterclaim for Declaratory Relief, Specific Performance, Injunctive Relief and Damages filed by Atty. French;

January 27

Response to Motion of MMWEC to Reschedule Summary Judgment Motion filed by Atty. Burak;

January 29

Letter filed by Atty. Parker re: Mo. to Quash the Subpoena;

The Villages' and WEC's Memorandum of Law in Opposition to Pltf's Mo. for Summary Judgment filed by Attys. Howe, Walke & Kehoe;

Deft MMWEC'S Memo of Law in Opposition to Plaintiff's Motion for Summary Judgment and Affidavit of Walter Gaebler, II Asst. Treasurer of

(Dec. & Injunctive
Relief – Power Project)

1986
January 29

MMWEC, in Opposition to Plaintiff's Motion for Summary Judgment filed by Atty. Gaebler;

Hearing on certain pending motions;
Morse, Jensen, Woodward, Js; Hartshorn, R.;
Motion to Dismiss Counts X-XIV-under advisement;
MMWEC's Motion to Dismiss dtd 12/16/85 – under advisement;
DPS Mo. to Quash Subpoena and Reschedule Deposition-withdrawn
Motions continue to be heard on 2/18/86 at 9:30 A.M.;
Judge Morse ordered from the bench counsel are to proceed according to Rule 5(d) as it pertains to discovery;

COMPLEX ACTION – JUDGE MORSE ASSIGNED
COUNTERCLAIM

S-412-85 Wnc *RULE 5(d)*
VT. DEPARTMENT OF
PUBLIC SERVICE

vs Vol 114 P 66

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC CO., ET AL

(Dec. and Inj. Relief –
Power Project)

(SEE COVER PAGE FOR LIST OF APPEARANCES)

1986
February 20

Letter filed by Atty. Kehoe requesting a transcript of hearing held 2/18/86; Copy of letter hand-given to Reporter Chamberlain;

(Dec. & Injunctive
Relief – Power Project)

1986

February 20

Affidavit of Donald R. Ellison filed by Atty. Howe;

February 21

Check rec'd from Atty. Parker in amount of $39.50 in payment of a copy of the transcript of hearing held 1/29/86 and hand-given to Reporter Hartshorn; Said copy of transcript mailed to Atty. Parker;

February 24

Check in the amount of $39.50 rec'd from the State of VT in payment of a copy of the transcript of the hearing held 1/29/86 and hand-given to Reporter Hartshorn; Copy of Transcript hand-given to Brenda Pepin of Atty. Marks' office;

March 5

Notice of Appearance on behalf of Deft., Village of North-field filed by Atty. Howe;

Mo. for Extension of Time With Respect to Respond to the Filings of Pltf., VEC and Stowe in Connection with Pltf's Mo. for Summary Judgment and for Hearing, Memorandum in Support of Motion with attachments, Affidavit of William J. Gallagher and Affidavit of William H. Dunn, Jr. filed by Attys. Walke, Howe and Sikora;

March 6

Opposition to LLMNW's Request for Extension of Time to Respond to Pltf's Summary Judgment Filings & Request for Order filed by Attys. Mark and Yessne;

March 7

Affidavit of William H. Dunn, Jr., Manager of MMWEC's Power Management Div., in Support of MMWEC's Memorandum of Law filed by Atty. Howe;

(Dec. & Injunctive
Relief – Power Project)

1986
March 10

Mo. for Summary Judgment, Mo. to Amend Complaint, Application for Modification of Preliminary Injunction Order, Village of Stowe's Supplemental Memorandum of Law and Affidavit of Joyce Slayton filed by Atty. French;

March 11

Objection to Application for Modification of Preliminary Injunction filed by Atty. Mello;

March 14

DPS Mo. for Order Compelling Discovery Responses from the MA. Municipal Wholesale Electric Co. filed by Attys. Marks & Yessne;

Village of Stowe's Memorandum in Response to the Village's Mo. for Extension of Time filed by Atty. French;

JUDGE MEAKER

COMPLEX ACTION – ASSIGNED *COUNTERCLAIM*

Vol 114 P 66 S-412-85 Wnc *RULE 5(d)*

VT. DEPARTMENT OF
PUBLIC SERVICE

vs

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC CO., ET AL

(Dec. and Inj. Relief –
Power Project)

(SEE COVER PAGE FOR LIST OF APPEARANCES)

1986
April 23
Mo. to Enlarge filed by Atty. Singal (FSSC&R);

Mo. to Compel & Memorandum of Law filed by Attys. Howe & Kehoe;

Opposition to Pltf's Mo. for Order Compelling Discovery filed by Atty. Howe;

April 24
Letter filed by Atty. Marks re: discovery;

April 28
Letter filed by Atty. Howe re: discovery;

May 1
Answer of the Massachusetts Municipal Wholesale Electric Company filed by Attys. Caruso and Sikora;

Hearing on pending motions; Morse, Jensen & Woodward, Judges Liz Trotter, Reporter; Pre-filed testimony of experts to be filed by 5/30/86; Status conference scheduled on 6/13/86 at 1:00 P.M.;

May 16
Memorandum in Opposition to Mo. of LLMW to Compel Discovery filed by Attys. Marks and Yessne;

May 22
Reply Memorandum of Vt. Electric Cooperative Inc. in Support of Summary Judgment and the Affidavit of Michael L. Burak filed by Atty. Burak;

June 2
Letter to Judge Morse from Atty. Yessne filed re: discovery;

Prefiled Direct Testimony of William J. Gallagher on Behalf of Defts Villages and WEC filed by Atty. Howe;

(Dec. & Injunctive
Relief – Power Project)

1986
June 2

Defendants' Joint Pre-Trial Brief signed by Atty. Howe, Atty. Mahoney, and Atty. Reginald Howe filed;

Testimony of Eugene W. Devlin on Behalf of Massachusetts Municipal Wholesale Electric Co.; Testimony of Guy W. Nichols on Behalf of Massachusetts Municipal Wholesale Electric Co. and Defts' Proposed Stipulation of Facts filed; (all documents filed on 6/2/86 mailed to Judge Morse)

June 12

Proposed Stipulation of Facts, Second Amended Complaint Against All Defts, Mo. to Amend Complaint & Memorandum of Law in Support of Motion filed by Attys. Marks & Yessne;

June 13

Status conference held; Morse, Jensen & Woodward, Judges; Hartshorn, Reporter;

Counsel working on Stipulation of Facts;

JUDGE MEAKER

COMPLEX ACTION – ASSIGNED *COUNTERCLAIM RULE 5(d)*

S-412-85 Wnc Vol 114 P 66

VT DEPARTMENT OF
PUBLIC SERVICE

v.

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC CO., ET AL

(Dec. & Injunctive
Relief – Power Project)

1986

August 7

Letter from Michael Marks, Dir. for Public Advocacy filed confirming his oral request for a copy of the expedited transcripts of the hearings held 7/30, 7/31 and 8/1/86; Copy mailed to Reporter Hartshorn; Check in the amount of $22.50 rec'd from Atty. Howe in payment of outstanding amount due for pages 26-30 of first partial transcript done; Check in the amount of $15.75 rec'd from Atty. Howe in payment of the additional pages of Mr. Gillette's testimony; and check in the amount of $645.00 rec'd from Atty. Howe in payment of the 1/2 estimated cost for a transcript of the three days of hearing held 7/30, 7/31 and 8/1/86; All three checks mailed to Reporter Hartshorn;

August 8

Hearing held on Pre-filed testimony re Gallagher; Meaker, Jensen, Woodward, Judges; Reisner, Reporter; No presently pending motions shall be set for hearing without a request for same by the moving party;

Stipulation and Procedural Order filed and copies hand-given to counsel;

Volumes 1 and 2, Exhibits to Defendants' Proposed Stipulation of Facts, filed by counsel;

August 12

Motion to Consolidate with S-301-86, MMWEC v. State of VT, et al, filed by Atty. Parker;

Phone call per Atty. Yessne that 8 items marked with an X on Stipulation Exhibit are *not* to be considered by Judge Meaker;

August 14

Transcript of Partial Testimony of Clayton Gillette filed by Reporter Hartshorn; $16.00 due from Atty.

(Dec. & Injunctive
Relief – Power Project)

1986
August 14
Marks; Transcript mailed to Atty. Marks per Reporter Hartshorn (mailed 8/19/86);

September 2
Letter from Atty. Marks filed re copies of the expedited transcripts of the hearings held 7/30, 7/31 and 8/1/86; Copy of letter hand-given to Reporter Hartshorn;

September 3
Reporter Hartshorn phoned Atty. Marks re transcript of hearings held 7/30, 7/31 and 8/1/86; Atty. Marks advised there was a mix-up in his office and he *does have* the transcript;

September 15
Letter filed by Atty. Yessne re: transcript of hearing held 5/1/86; Copy of letter mailed to Reporter Trotter;

September 19
Stipulation of Facts filed by counsel;

JUDGE MEAKER

COMPLEX ACTION – ASSIGNED SUPREME COURT 386-555 *COUNTERCLAIM RULE 5(d)*

S-412-85 Wnc Vol 114 P 66

VERMONT DEPARTMENT
OF PUBLIC SERVICE

v.

MASSACHUSETTS MUNICIPAL
WHOLESALE ELECTRIC CO., ET AL

(Declaratory and Injunctive
Relief – Power Project)

1986
October 6

Check rec'd from the State of Vermont to Reporter Trotter in the amount of $49.50 in payment for the transcript of the hearing held 5/1/86 and mailed to Reporter Trotter (said transcript had already been released);

Reporter Hartshorn advised she had also rec'd her check from the State of Vermont in payment of the transcript of hearings held 7/30/86, 7/31/86 and 8/1/86 (copies of the transcripts-said copies had been previously released);

Letter filed by Atty. Howe re proposed "Order Realigning Parties";

October 8

Hearing on all Motions and Cross Motions for Summary Judgment Meaker, Judge; Joan Giard, Reporter; Under advisement;

October 10

Proposal of the Villages and WEC for Additional Orders filed by Atty. Howe;

November 26

Judgment with Appendix filed; Copies mailed to counsel;

December 2

Notice of Appeal dated December 2, 1986 filed by Attorney Yessne; Copies of Notice of Appeal mailed to Judge Meaker, counsel and the VT Supreme Court 12/3/86;

Letter filed by Atty. Marks requesting a transcript of the hearing held 10/8/86;

December 3

Transcript Order Notification and copy of Atty.

(Dec. & Injunctive
Relief – Power Project)

1986

December 3

Marks' letter mailed to Reporter Giard (Reporter Giard has her notes of the hearing held 10/8/86);

December 5

Notice of Appeal dated December 4, 1986 filed by Attorney Burak; Copies of Notice of Appeal mailed to Judge Meaker, the VT Supreme Court and counsel 12/8/86;

December 24

Notice of Appeal dated December 22, 1986 filed by Attorney French; Copies of Notice of Appeal mailed to Judge Meaker, the VT Supreme Court and counsel 12/29/86; $35.00 check returned to Atty. Stackpole 12/29/86;

1987

January 23

Certified copy of Docket Entries mailed to the VT Supreme Court per Atty. Yessne's request;

February 20

Copy of letter to Jane Fitzpatrick, Clerk, Vt. Supreme Court from Atty. Anderson filed re: docketing statement;

EXHIBIT B

STATE OF VERMONT
WASHINGTON COUNTY, ss.

VERMONT DEPARTMENT OF PUBLIC SERVICE, Plaintiff, vs. MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC CO.; VILLAGE OF LUDLOW; VILLAGE OF LYNDONVILLE; VILLAGE OF MORRISVILLE; VILLAGE OF NORTHFIELD; VERMONT ELECTRIC COOPERATIVE, INC.; WASHINGTON ELECTRIC COOPERATIVE, INC., Defendants.	Washington Superior Court Docket No. S-412-85 Wnc

MOTION TO INTERVENE

NOW COMES the Village of Stowe, by and through its attorney, Edward B. French, Jr., and moves the Court for permission to intervene as a party plaintiff in the above-entitled action.

MEMORANDUM OF LAW

A. *FACTUAL BACKGROUND.*

This is an action brought by the Vermont Department of Public Service to invalidate the Project Six Power Sales

Agreements entered into between Massachusetts Municipal Wholesale Electric Company ("MMWEC") and various Vermont utilities, including the Village of Morrisville. The Village of Stowe did not enter into a Power Sales Agreement directly with MMWEC, but, pursuant to a Power Sales Contract with the Village of Morrisville dated May, 1981, it agreed to purchase 2.77 megawatts of Morrisville's entitlement in Project Six. The Power Sales Contract explicitly provided that Stowe would fully perform each and every "undertaking" set out in the previously executed Power Sales Agreement between Morrisville and MMWEC. It is the Village of Stowe's position that the Power Sales Agreement and the Power Sales Contract are void and unenforceable.

B. *LEGAL BASIS FOR INTERVENTION.*

(1) *Intervention as a Matter of Right.*

VRCP 24(a) provides that:

> Upon timely application anyone shall be permitted to intervene in an action.. . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Stowe has a clear and undeniable right to intervene in this action under the provisions of VRCP 24(a). It has an interest relating to the Power Sales Agreement, since it may be liable to pay a share of Seabrook costs under its contract with Morrisville if the MMWEC agreements are held to be valid. It is situated such that disposition of this

action may impede its ability to protect its interest. A holding affirming the validity of the Power Sales Agreement would impose liability upon Stowe, because the Agreement terms are incorporated into Stowe's Contract with Morrisville. Stowe's position is not adequately represented by other parties to this action. Morrisville has an obvious interest in upholding the validity of its Contract with Stowe, and the Department of Public Service represents the public good, which may not be identical with the Village of Stowe's private interest.

This case falls directly within the rules of interpretation discussed in *In Re Vermont Public Power Supply Authority*, 140 Vt. 424 (1982). In that case, municipal rate payers were allowed to intervene in a Public Service Board proceeding dealing with the validity of an obligation entered into by VPPSA. As in this case, the ratepayers' interest arose from their obligation to pay a share of the loan obligation in the event its validity was upheld. Id. at 431. Their ability to protect their interest would have been impeded if they were not allowed to intervene in a Public Service Board proceeding dealing with the validity of the obligation. Id. at 432. The Vermont Supreme Court in that case specifically distinguished between the interest of the State (already a party to the action), as representative of the public good, and the potentially differing private interests pursued by the ratepayers. Id. at 433.

(2) *Permissive Intervention.*

Even if the Village of Stowe could not intervene as a matter of right, it has adequately satisfied that grounds

for permissive intervention set out in VRCP 24(b). Its claim and the main claim in this case have identical questions of both fact and law, since the terms of the MMWEC Agreement are at the very heart of the contract between Stowe and Morrisville. There will be no undue delay of the proceedings, since this action is less than a week old. There are no grounds that concluding that Stowe's involvement in this suit will prejudice the rights of other parties.

(3) *Procedural Prerequisite to Intervene.*

One prerequisite to intervention is the filing of a pleading which sets forth the claim for which intervention is sought. The Village of Stowe has included its proposed Complaint with this Motion.

C. *CONCLUSION.*

The Village of Stowe has a right to intervene under VRCP 24(a), and has furthermore satisfied the grounds for permissive intervention under VRCP 24(b). It asks this Court to include it as a party plaintiff in this case.

Dated at Stowe, Vermont, this 24th day of October, 1985.

/s/ Edward B. French Jr.
Edward B. French, Jr.
Attorney for Village of Stowe

Supreme Court, U.S.
FILED
JUL 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1769

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,

Petitioner,

v.

VERMONT DEPARTMENT OF PUBLIC SERVICE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

---

BRIEF IN OPPOSITION OF RESPONDENT VERMONT DEPARTMENT OF PUBLIC SERVICE

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July 10, 1989

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Should the Court deny certiorari under 28 U.S.C. § 1257(a) in a case where the petitioner did not properly present its constitutional issues to the state court?

2. Does refusal to allow reargument on a new issue, according to consistent Vermont practice, constitute adequate and independent state grounds which may not be reviewed under 28 U.S.C. § 1257(a)?

3. Has a litigant, which presented extensive materials and filings in a state action under the rules of civil procedure, been denied due process of law by the refusal of the highest state court to hear reargument on constitutional issues raised then for the first time?

4. Is a judicial decision, which holds in a case of first impression that a novel contractual arrangement is invalid under state law, a state action contrary to the Due Process Clause?

5. Does a judicial decision, which voids a public contract because it delegated authority contrary to state law, discriminate against interstate commerce because a nonresident is a party to the contract?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1769

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,

Petitioner,

v.

VERMONT DEPARTMENT OF PUBLIC SERVICE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

---

BRIEF IN OPPOSITION OF RESPONDENT VERMONT DEPARTMENT OF PUBLIC SERVICE

Respondent, Vermont Department of Public Service ("VDPS"), respectfully requests that this Court deny the petition for a writ of certiorari dated May 1, 1989 submitted by Massachusetts Municipal Wholesale Electric Company ("MMWEC").

JURISDICTION

A writ of certiorari should not issue because the case does not meet the prerequisites for review of a state judgment under 28 U.S.C. § 1257(a). The pertinent part of section 1257(a) authorizes review if a "title, right, privilege, or immunity" has been "set up or claimed under the Constitution" by the petitioner in the state action. This case fails to meet the requirements for such review under the jurisprudence of the Court in two ways: 1) Pe-

titioner failed to properly raise its constitutional issues in the Vermont courts (see pages 9-14 below); and 2) the decision of the Vermont Supreme Court to deny reargument rests on adequate and independent state grounds (see pages 14-15 below).

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner MMWEC's lengthy Statement of the Case contains surprisingly little about the pertinent provisions of the contracts at issue here or the course of the litigation to this point. The result is a fragmentary (and at points inaccurate) version of the obligations to which the Vermont Supreme Court objected and an incomplete review of the procedural history that glosses over Petitioner's failure to raise its constitutional claims in a timely and proper manner (see pages 4-8 below).

A. The Power Sales Agreements

This case involves the validity of contracts, denominated Power Sales Agreements ("PSAs"), between MMWEC and six public-owned utilities created under Vermont law (the "Vermont Participants"). The question of the PSAs' validity was one of first impression before the Vermont Supreme Court; no Vermont court or regulatory body had previously considered arrangements even remotely similar to the PSAs, or construed the Vermont statutes at issue.[1]

In this initial test of the PSA's, the Vermont Supreme Court found two defects sufficiently substantial to require that the contracts be declared void ab initio: lack

[1] MMWEC wrongly implies that the PSAs were approved by the Vermont Public Service Board ("PSB") under its General Order No. 45. Petition at 9-10. This regulation required the Vermont Participants only to give notice of the PSAs, and has no provision for PSB approval. *In re Central Vt. Pub. Serv. Corp.*, 83 P.U.R. 4th 532, 542 n.13 (Vt. P.S.B. 1987). The PSB studied the involvement of only one of the six Vermont Participants.

of statutory authority (Petitioner's App. 6a to 11a, citing 30 V.S.A. sec. 4002) and impermissible redelegation of authority to MMWEC (Petitioner's App. 11a to 22a). The Vermont Supreme Court summarized the offending provisions of the PSAs as follows:

> Under the provisions of the PSAs, all decision-making power with regard to the project rests with MMWEC; the Vermont participants retain no voice in decisions to incur debt, to commence operation of the plant, or to decommission the plant. They have abdicated all management responsibility for and have obtained no ownership interest in the project. Petitioner's App. 11a.

MMWEC is a partial owner of the Seabrook nuclear power plant in New Hampshire. In 1979, MMWEC proposed to the Vermont Participants that they purchase "Project Capability" from MMWEC's share of Seabrook. "Project Capability" is basically the amount of electric capacity and energy, "if any," that Seabrook is capable of producing at any particular time. PSA § 1(q), App. 11a. Thus, the Vermont Participants were not simply purchasing electricity, but were gambling on a chance that electricity would be produced. In return, the Vermont Participants were obligated to pay MMWEC amounts that did not reflect the amount of electricity made available to them, but instead reflected the costs incurred by MMWEC in constructing and operating the project, regardless of the operating status of the project (or even its completion). This payment obligation was incorporated in the "take-or-pay, hell-or-highwater" provision of the PSAs, § 5(d):

> (d) The Participant shall make the payments to be made to MMWEC under this Agreement whether or not the Project . . . is undertaken, completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of the Project . . . . (App. 17a)

In short, the PSAs required the Vermont Participants to make payments in respect of MMWEC's costs for a plant not yet constructed and which might never be capable of producing electricity. Notwithstanding the nature of this risk, the PSAs denied the Vermont Participants any role in the planning, construction, financing, or operation of the project. MMWEC was empowered to make all decisions concerning issuance of bonds, decommissioning, termination, operation or expansion of the project without consulting the Vermont Participants.

The Vermont Supreme Court concluded that there is no basis in Vermont law for Vermont publicly-owned utilities to enter into these extraordinary provisions. Following similar decisions in other jurisdictions, the court determined that where the legislature had intended to allow Vermont municipalities to enter contracts so far afield from the ordinary purchase of capacity and energy, it had passed explicit authorizing legislation. The court further determined that the contractual abdication by the Vermont Participants over the fiscal and legislative affairs of their utility systems ran afoul of time-honored restraints on the conduct of municipal affairs. In particular, the court followed its own precedents in finding that a municipality that had been delegated authority to operate in the public trust could not redelegate that authority without explicit legislative permission. The court concluded that an arrangement that permitted MMWEC unilaterally to fix the amount of the Vermont Participants' payment obligations and to constrain Participants' exercise of their borrowing power constituted such an unlawful delegation.

B. Proceedings Below

A complete procedural history shows that VDPS repeatedly urged that the PSAs be voided. MMWEC, however, failed at every step—in pleadings, on summary

judgment, and on appeal—to present its constitutional arguments to defend against this remedy.

Pleadings: In the first thirteen of its fourteen counts, the VDPS complaint alleged that the PSAs were "void, invalid, ineffective and unenforceable." Petitioners App. 46a-55a. VDPS made claims based on common law, state statute, and the Vermont and Federal Constitutions. VDPS prayed that the Vermont Superior Court declare the PSAs "void, invalid, ineffective and unenforceable," and enjoin the Vermont Participants from making payments to MMWEC under the PSAs. (Petitioners App. 55a).

MMWEC had more than six months to consider its defenses before filing its answer. In the meantime, MMWEC availed itself of many of the protections provided under the Vermont Rules of Civil Procedure.[2] MMWEC twice moved to enlarge time to file a responsive pleading under Rule 6(b); and unsuccessfully moved to dismiss the complaint on a host of grounds under Rule 12(b). (Petitioner's App. 58a). The answer raised seven affirmative defenses under Vermont law in addition to the eighth through fourteenth defenses reprinted in Petitioners App. at 57a-58a. From the outset, MMWEC was represented by experienced Vermont and Boston counsel. Petitioners App. 27a, 58a, 63a-64a.

MMWEC did *not* plead that to void the PSAs would violate the Constitution; rather, MMWEC pleaded that commencement of the civil action by VDPS did so. Each of MMWEC's ninth through fourteenth defenses branded as unconstitutional the "conduct of the Vermont Depart-

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[2] The Vermont Rules of Civil Procedure, adopted in 1971, are very closely modeled on the Federal Rules of Civil Procedure. Even the numbering of the rules is parallel. "Federal cases interpreting the Federal Rules are an authoritative source for the interpretation of identical provisions of the Vermont Rules." Reporter's Notes to Vt. R. Civ. P. 1.

ment of Public Service, by prosecution of the present litigation and otherwise." Statements by MMWEC that it pleaded constitutional affirmative defenses to invalidation of the PSAs are simply not true. Questions Presented ¶ 2, Petition at i; Statement of the Case, Petition at 11.

Summary Judgment: MMWEC did not pursue any constitutional defenses after filing its answer. VDPS and MMWEC exchanged extensive filings on their cross-motions for summary judgment, including pre-filed testimony, proposed and agreed statements of fact, pre-trial briefs, memoranda, and reply memoranda. MMWEC filed a 45 page "Defendants Joint Pre-Trial Brief", May 30, 1986; a 55 page "Defendants' Joint Brief on Cross-Motions for Summary Judgment", September 22, 1986 (Printed Case at 267-324); and "Defendants' Joint Reply Memorandum on Cross-Motions for Summary Judgment" (October 1, 1986) (Printed Case at 413-430). In none of these did MMWEC present evidence or argument on any constitutional affirmative defenses. Indeed, MMWEC did not even so much as mention them. Accordingly, the Superior Court had no occasion to discuss or decide any affirmative defense, including those MMWEC raises here.[3]

Appeal: VDPS sought reversal on the grounds that the PSAs are void. Brief of Appellant, January 30, 1987, at 2, 20, 82, 112. MMWEC's brief to the Vermont Supreme Court, however, is completely silent on affirmative defenses to voiding the PSAs. MMWEC's 67 page brief below is devoid of argument, and indeed all mention, of its constitutional defenses. The lengthy "Table of Au-

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[3] In contrast, VDPS and MMWEC actively briefed VDPS constitutional causes of action to void the PSAs. See VDPS filings dated 11/26/85 at 36-45; and 9/22/86 (Printed Case at 237-245); MMWEC filings dated 1/28/86 at 27-29; and 9/22/86 (Printed Case at 322). In its Opinion and Order granting summary judgment in favor of MMWEC against VDPS, the Superior Court decided the constitutional claims presented by VDPS. Petitioners App. 82a-84a.

thorities Cited" in MMWEC's brief does not contain a single citation to the Federal Constitution, or to any case cited to the Court in the Petition. Joint Brief of the Defendants-Appellees, March 1987, at ii-viii.

Although silent on affirmative defenses of its own, MMWEC's brief below referred to the state law affirmative defenses of its co-defendants. These statements are all that MMWEC briefed about affirmative defenses. In describing the Superior Court proceedings, MMWEC apprised the Vermont Supreme Court that "the defendant villages and WEC [Washington Electric Cooperative] . . . also asserted a number of affirmative defenses to DPS's claims, including *inter alia*, waiver, estoppel, and res judicata, none of which was decided below." *Id.* at 3. At no point did MMWEC refer the Vermont Supreme Court to any purported constitutional defense. In its "Statement of Issues," MMWEC did touch on the disposition of claims and defenses not decided by the Superior Court:

> A number of issues raised below by the DPS and other plaintiffs have not been briefed and therefore must be deemed waived.[18] Certain issues that have been briefed by the DPS were not reached by the trial court and need not be reached by this Court if it affirms the judgment below.[19] If this Court does not affirm the judgment, the case should be remanded for determination by the trial-court of the issues not previously addressed.

MMWEC's footnotes 18 and 19 state in their entirety:

> [18] These include various state and federal constitutional claims as well as the contention that the PSA's conflict with 30 V.S.A. §§ 225-227 authorizing the PSB to regulate electric rates.
>
> [19] These include certain affirmative claims of the DPS as well as the affirmative defenses raised by the defendant villages and WEC. *Id.* at 20-21.

The Vermont Supreme Court noted MMWEC's attempt to reserve nonconstitutional affirmative defenses for remand, but declined to order consideration on further proceedings. Petitioners App. 23a. "Our holding that the PSAs are ultra vires and void ab initio obviates any such necessity." *Id.* The Vermont Supreme Court had no occasion to consider or decide any constitutional argument or affirmative defense by MMWEC.

The Vermont Supreme Court reversed the Superior Court and entered judgment for the plaintiffs on the grounds that the PSAs were void ab initio under Vermont law. Petition App. 3a, 24a. Only then, in a "Motion for Reargument" under V.R.A.P. 40, did MMWEC for the first time argue that voiding the PSAs would violate the Constitution. Petition App. 25a Paragraph 8 of MMWEC's motion for reargument makes a bare assertion of violation of the Commerce, Takings, and Due Process clauses. Petition App. 27a. MMWEC's grounds for the assertions appear in its memorandum in support of reargument. App. 38a-39a. The Vermont Supreme Court denied reargument on the ground that MMWEC failed "to identify points of law or fact previously overlooked or misapprehended." Petitioners App. 28a. This reason follows the requirement in V.R.A.P. 40 that a motion for reargument state "the points of law or fact, presented in the briefs upon the original argument, which . . . the Court has overlooked or misapprehended."

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petitioner Did Not Properly Present Its Constitutional Issues to the Vermont Courts

Review under 28 U.S.C. § 1257(a) requires that the petitioner have timely and adequately presented its issues to the lower court. *Clark v. Jeter*, —— U.S. ——, 108 S.Ct. 1910, 1913 (1988). The Court has declared its "practice, when reviewing decisions by state courts, not to decide federal claims that were not presented or passed upon below." *Id.*; *quoting Bankers Life & Casualty Co. v. Crenshaw*, —— U.S. ——, 108 S.Ct. 1645, 1651 (1988).[4] When, as is the case here, "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (citations omitted). To make this showing, "[a]t the minimum . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981), *followed in Bankers Life v. Crenshaw*, 108 S.Ct. at 1650.

The record below reveals an abdication by MMWEC of its responsibility to raise and press its arguments under the federal constitution. It is not surprising that both

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[4] Many of the Court's decisions hold that Section 1257 does not confer jurisdiction to hear such cases. *E.g.*, *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983) (citing cases). Even if the Court "were not jurisdictionally barred from considering claims not pressed or passed upon in the state court . . . the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review." *Heath v. Alabama*, 474 U.S. 82, 87 (1985).

the Superior Court and the Supreme Court did not mention, let alone pass upon these issues, for at every stage of the case—from pleading, through summary judgment, and on appeal—MMWEC did not properly bring its arguments as reasonably required under Vermont law.

Pleading: MMWEC set forth no affirmative defense that the judicial voiding of the PSAs would violate the Constitution. Its ninth through fourteenth defenses asserted a wholly different matter, that the actions of VDPS *as plaintiff* violated the Constitution. This bizarre assertion, at best, would sound as a counterclaim. It hardly served to apprise the Vermont trial court of the nature and substance of constitutional argument with the "fair precision" required. *Street v. New York*, 394 U.S. 576, 584 (1969). To raise a federal question adequately, both the act complained of, and the constitutional doctrine said to be involved, should be identified with reasonable particularity. *See Clark v. Jeter*, 108 S.Ct. at 1913-14; *Taylor v. Illinois*, 484 U.S. ——, 108 S.Ct. 646, 651 n.9 (1988).

Vermont procedure requires that an affirmative defense be pleaded, or it is waived. Under Vt. R. Civ. P. 8(c), which is almost identical to the parallel federal rule, "unless an affirmative defense is specifically raised in the pleadings, it is not generally available at trial or appeal." *Brouha v. Postman*, 145 Vt. 449, 452, 491 A.2d 1038 (1985). Vermont practice is the same as under Fed. R. Civ. P. 8(c). *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1278 and n.29 (1969 & Supp. 1987) (gathering cases).

Summary Judgment: MMWEC presented no supporting material or argument whatsoever on its affirmative defenses to the Superior Court. Therefore, without regard to the adequacy of its pleading, MMWEC abandoned the defenses under Vermont law by failing to introduce evidence, and to bring them to the attention of the trial

court. *Prescott v. Smits*, 146 Vt. 430, 433, 505 A.2d 1211 (1986).

Here too Vermont follows federal practice. "The defenses initially raised but not thereafter briefed or argued are, of course, deemed to have been abandoned." *A & H Manufacturing Co. v. Contempo Card Co.*, 576 F.Supp. 894, 896 n.1 (D.R.I. 1983). Such affirmative defenses are not open on appeal. *Golden Oil Co. v. Exxon Co.*, 543 F.2d 548, 551 (5th Cir. 1976); *Hilton v. Mumaw*, 522 F.2d 588, 595 (9th Cir. 1975). Even the claimed violation of a constitutional right is deemed abandoned if it is not pursued after pleading. *Oklahoma v. F.E.R.C.*, 494 F.Supp. 636, 651, n.13 (W.D. Okla. 1980), *aff'd*, 661 F.2d 832 (10th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982); *Yapalater v. Bates*, 494 F.Supp. 1349, 1369 n.15 (S.D.N.Y. 1980), *aff'd mem.*, 644 F.2d 131 (2d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982).

MMWEC seeks to excuse the abandonment of its constitutional defenses by implying that the parties agreed to forego constitutional claims in order to focus on state law issues. MMWEC suggests that the parties voluntarily confined themselves to state law issues in the Superior Court. Petition at 11. In reality, VDPS repeatedly raised and briefed its constitutional claims to the Superior Court, and MMWEC responded to them. (Supp. Statement of the Case at 6 n.8 above). Any implication that the parties agreed to restrict the range of issues is wrong. MMWEC then states that, because the range of issues was restricted, the Vermont "courts did not address the federal law claims asserted in the pleadings." Petition at 12. To the contrary, the Superior Court ruled on VDPS constitutional claims. Petitioners App. 82a-84a. The Vermont Supreme Court discussed no constitutional issues simply because the parties did not brief them on appeal.

Appeal: Even if MMWEC had not waived and abandoned its constitutional issues in the Superior Court, it did so by its total failure to raise, brief, or even mention them on appeal. Vermont rules reasonably require that an appellate brief state concise and specific issues. V.R.A.P. 28. In two recent opinions, the Vermont Supreme Court has alerted counsel that the burden to raise, develop, and maintain a constitutional argument lies with the proponent, and the court will not consider a constitutional issue not presented in "a clear and concise manner." *State v. Jewett*, 146 Vt. 221, 229, 500 A.2d 233 (1985) (state constitution); *State v. Taylor*, 145 Vt. 437, 439, 491 A.2d 1034 (1985).

If MMWEC thought it had no opportunity to develop its constitutional defenses before the Superior Court, it could and should have brought them to the attention of the Vermont Supreme Court. MMWEC could have raised them to support the judgment in its favor, or to urge remand to consider them. MMWEC instead waived them by its silence. *Swanton Village v. Town of Highgate*, 128 Vt. 402, 403, 264 A.2d 804 (1970). MMWEC itself recognized this rule in brushing aside VDPS' constitutional claims. It assured the Vermont Supreme Court that "issues raised below by the DPS . . . have not been briefed and therefore must be deemed waived." (Joint Brief of the Defendants-Appellees at 20) (quoted above at 7).

MMWEC instead mentioned in passing the nonconstitutional affirmative defenses of its co-defendants. (Supp. Statement of the Case at 7 above). By its reference to some but not all affirmative defenses, MMWEC directed the Vermont Supreme Court away from the issues it raises now. The Vermont Supreme Court duly addressed those affirmative defenses despite MMWEC's passing reference to them. That the court took up the arguments it saw establishes that MMWEC's constitutional defenses

were passed over precisely because MMWEC did not present them to the Vermont court.

Motion for Reargument: The motion for reargument did not timely or adequately raise the issues in the Petition that voiding the PSAs would violate the Constitution. The Court's long-established rule is dispositive: "Questions first presented to the highest State Court on a petition for rehearing come too late for consideration here. . . ." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945). This rule has recently been followed to deny relief under very similar procedural circumstances. *See Prudential Federal Savings & Loan Association v. Flanigan*, 478 U.S. 1311 (Rehnquist, Circuit Justice 1986) (constitutional issues not presented to state court until petition for rehearing, which was denied without comment). The decision below granted the relief sought (voiding the PSAs), on the plaintiffs' state law theories, in a case of first impression. MMWEC does not and cannot contend that it was unfairly surprised by relief that could not have been anticipated, or by a sudden reversal of controlling precedent. Under these circumstances, MMWEC could not raise constitutional issues for the first time on motion for reargument. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980); *Estate of Wilson v. Aiken Industries, Inc.*, 439 U.S. 877, 879 (1978) (Blackmun, J., concurring in denial of certiorari).

Even if timely, MMWEC's motion for reargument did not adequately raise the issues it asserts here. The Petition gives one ground for certiorari: that MMWEC's procedural due process rights were violated by denying the opportunity "to assert and prove substantial federal constitutional affirmative defenses." Petition at i. *MMWEC did not raise this issue in seeking reargument.* Its memorandum in support of reargument mentions purported violations of the Takings and Commerce Clauses, but nowhere argues that its procedural due process rights were

violated. MMWEC cites the Due Process Clause, but only to explain that the "Takings Clause is made applicable to the states through the Due Process Clause." App. 39a. An unelaborated citation cannot be sufficient to apprise the state courts of the nature and substance of any one of the many doctrines under the Due Process Clause. The Court properly requires more, especially of a sophisticated litigant like MMWEC represented by counsel at all stages. *Cf. Taylor v. Illinois*, 108 S.Ct. at 651 n.9 ("generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights"); *Rotary International*, 481 U.S. at 550 n.9 (a "casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court").

II. The Decision Below Rests On Adequate and Independent State Grounds

The decision by the Vermont Supreme Court to deny MMWEC's motion for reargument rests on an adequate and independent state ground, so that the Court has no jurisdiction under 28 U.S.C. § 1257(a) to review the decision. *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). The decision rests on MMWEC's failure "to identify points of law or fact previously overlooked or misapprehended." Petition App. 28a. As is evident from the discussion above at 6-7, MMWEC did not present its constitutional issues to the Vermont Supreme Court in its brief on appeal. The ground for decision is exactly MMWEC's failure to satisfy the prerequisites for reargument under V.R.A.P. 40. That rule provides in part:

> The motion shall state with particularity the points of law or fact, *presented in the briefs upon the original argument*, which in the opinion of the moving party the Court has overlooked or misapprehended and which would probably affect the result. (emphasis added)

Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground, provided that the state rule is consistently followed. *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982). The Vermont court has steadfastly denied reargument, both before and since the adoption of V.R.A.P. 40 in 1971, to address issues not presented in the briefs on the original argument. "Rehearing is not available to afford a new opportunity to present questions that were not presented in the tribunal from which the appeal was taken and were not briefed nor argued on review." *Town of Fairlee v. Boston & Maine Corp.*, 127 Vt. 215, 219, 244 A.2d 53 (1968) (Holden, C.J.). *See e.g., State v. Percy*, 149 Vt. 623, 642, 548 A.2d 408 (1988); *Black River Associates, Inc. v. Koehler*, 126 Vt. 394, 404, 233 A.2d 175 (1967); *In re Moxley's Will*, 103 Vt. 100, 115-116, 152 A. 713 (1931).

Vermont denies reargument to any party seeking to raise a new issue, whether sought by the appellant or the appellee, like MMWEC. "A rehearing is not granted for the purpose of affording opportunity to present new questions. And where there was occasion and opportunity for raising the point at the hearing, the rule applies equally to one not the excepting party." *Ryan v. Orient Insurance Co.*, 96 Vt. 291, 305, 119 A. 422 (1923) (citations omitted). Recent instances of reargument denied to an unsuccessful appellee seeking to raise new issues are *State v. Percy*, 149 Vt. at 642; *Bourne v. Jajoie*, 149 Vt. 45, 53, 540 A.2d 359 (1973); and *Corey v. Furgat Tractor & Equipment, Inc.*, 147 Vt. 477, 480, 520 A.2d 600 (1986). The rule applies as well to bar reargument to raise a constitutional affirmative defense to the judgment for the first time. *Coolidge v. Coolidge*, 130 Vt. 132, 135, 287 A.2d 566 (1972) (impairment of contracts); *Van Dyke v. Cole*, 81 Vt. 399, 70 A. 1103 (1908) (same).

III. MMWEC Enjoyed Full and Fair Opportunity to Litigate Its Constitutional Defenses Below in Accordance with Hight Standards of Procedural Due Process

Due process in a civil action requires that a party have fair notice of the issues and a reasonable opportunity to litigate them. *See generally Boddie v. Connecticut*, 401 U.S. 371 (1971). The procedural history (above at 5-7) shows that MMWEC had plain notice that the validity of the PSAs was at stake, and that MMWEC had ample opportunity at trial and on appeal to raise and press its constitutional defenses. Yet MMWEC did not present these issues for decision by the Vermont courts. Rather, MMWEC failed to set up these affirmative defenses in its pleadings; did not pursue them at trial; and did not even mention them on appeal until seeking reargument. MMWEC's plaint that it was denied procedural due process wrongly blames the Vermont courts for its own abject failure to litigate its defenses below.

Indeed, the procedural record is a testament to the high standard of procedural due process afforded MMWEC. MMWEC complains of no aspect of Vermont's civil proceeding which prevented it from litigating its constitutional defenses. There is no suggestion or inference that Vermont procedure—almost identical to the Federal rules approved by this Court—contains arcane rules, traps for unwary counsel, or arbitrary restrictions which unfairly restricted MMWEC's case. MMWEC was represented by three law firms to protect its interests at all stages of the action. MMWEC mentions no instance when it was allowed less than ample time, hearings, and filings to present evidence and argument.[5]

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[5] MMWEC's brief assured the Vermont Supreme Court: "The cross-motions for summary judgment were heard and determined on a record consisting of an extensive stipulation of facts, together with five volumes of exhibits, and prefiled testimony and oral cross-examination of the parties' experts." *Id.* at 3-4 (footnote omitted).

The Petition cites, with no discussion, decisions in which state procedure operated to cut off reasonable attempts to raise a federal issue. Petition at 13. These cases are fairly characterized as instances of trumped up, extreme, and often racially motivated procedural rulings, where the Court properly reached out to review plain error in order to prevent fundamental unfairness. None of them stand for the proposition that due process is denied a litigant like MMWEC which didn't bother to raise and press its claims in a readily available forum.

IV. The Petitioner's Federal Constitutional Claims Lack Substantive Merit and Require No Further Adjudication in the State Court System

A. *Judicial Invalidation of a Contract in a Case of First Impression Does Not Constitute a Deprivation of Property or Otherwise Implicate the Due Process Clause*

Petitioner's substantive arguments lack sufficient merit to require further adjudication in the state courts. Petitioner's first claim is that, even though the Vermont Supreme Court had never before determined the validity of a hell-or-high water contract like the PSAs, MMWEC was deprived of property in violation of the Due Process Clause by a judicial declaration of invalidity. Oddly, Petitioner does not explain its claim in terms of due process, but by reference to Takings Clause and Contracts Clause jurisprudence. At the same time, Petitioner seeks to avoid the limitations this Court has placed on those clauses.

The holding of the Vermont Supreme Court rests on the well-established doctrine of non-delegation: a Vermont municipality or cooperative may not, without explicit legislative permission, redelegate all authority to make financial or legislative decisions. *See* 6A E. McQuillan, *Municipal Corporations* § 24.21 (3d ed. rev. 1988). The PSAs obligate Vermont entities to pay pro

rata costs to construct a generating plant, even if the plant is never finished or operating. The PSAs exclude them, however, from the planning, construction, or operation of the plant that might cause or avoid the risk that the project will be a "dry hole". The Vermont Supreme Court held that this was an impermissible delegation of authority.

By its holding, the Vermont court has done nothing more than require politically accountable officials of political subdivisions to exercise the discretion with which they have been entrusted. Any deviation from this principle requires an explicit legislative authorization. See Petition App. 12a, n.2; 18a, n.3. Petitioner nowhere contends that the Vermont Supreme Court's finding of improper delegation under the PSAs was erroneous. It is difficult to comprehend that the Due Process Clause prohibits judicial application of the non-delegation doctrine to invalidate a contract that conflicts with the doctrine.

The thrust of Petitioner's argument is that a judicial decision has impaired the value of the PSAs. One would imagine that if any relief existed under the Federal Constitution for abrogation of a contractual right, it would fall within the Contracts Clause. U.S. Const. art. I, § 10, cl. 1. But, as even the Petitioner acknowledges, the Contracts Clause is not violated by a judicial decision. *See Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924); Petition at 20 n.5.[6] The Contracts Clause was intended to enjoin the legislature from abrogating established rights in order to favor particular interest groups. The primary focus of the Contracts clause has been "upon *legislation* that was designed to repudiate or adjust pre-existing

[6] Indeed, the Court rejected such a claim in *Tidal Oil* notwithstanding the allegation that the state court had announced a sudden change in state law from its previous declarations. The claim is all the weaker where, as here, the state judicial opinion addresses an issue of state law—the validity of "hell-or-high water" obligations—in the first instance.

debtor-creditor relationships that obligors were unable to satisfy." *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 503 (1987) (emphasis added). The Commerce Clause was never intended as a check on the judicial power to determine the validity of contracts, or the capacity of courts to interpret what rights exist for parties to contracts. Thus, even to the extent that Contracts Clause criteria have been "assimilated" into Due Process standards, *see* Petition at 15 n.3, those criteria are not applicable to judicial declarations of law.

Petitioner invokes the "takings" standard of "investment-backed expectations" to support its ostensible due process argument. It relies on cases decided under the Federal Takings Clause, U.S. Const., amend. V. Petition at 14.[7] This Court has never held that judicial interpretations of law are implicated in the Takings Clause, or that the judgment in a civil action creates a claim for compensation by those against whom law is construed.[8] Moreover, the mere fact that governmental action caused a loss of economic expectation is not in itself a basis for a takings claim; the claimant must first establish that it had settled rights and expectations. *See Duquesne Light Co. v. Barasch*, —— U.S. ——, 109 S. Ct. 609 (1989). Unlike traditional takings cases in which governmental action interferes with settled property rights, here we

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[7] Ironically, the primary cases on which Petitioner relies actually found *no* taking to exist. *See PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

[8] Justice Stewart once intimated in a concurring opinion that a taking could occur by judicial interpretation of law to the extent that it "constitutes a sudden change in state law, unpredictable in terms of the relevant precedents." *Hughes v. Washington*, 389 U.S. 290, 294, 296-97 (1967) (Stewart, J., concurring). Even if that concurrence became law, it has no applicability to a case of first impression, such as this one, and where the basis for decision (the non-delegation doctrine) had strong roots in judicial decisions of the state.

find only a judicial interpretation of law that determines the existence and scope of rights under a contract presented to the court in a case of first impression. The judicial act of determining what rights exist in the first place triggers no constitutional claim.

Even if the judicial interpretation of a contract implicates a "takings" analysis, MMWEC has no claim because it had no "reasonable" investment-backed expectations. Hell or high water arrangements were novel in Vermont and elsewhere. Courts have divided over their validity.[9] Many states have deemed them so unlike traditional utility financing arrangements that special enabling legislation was enacted. *See e.g.*, S.C. Code Ann. § 6-23-110 (Law Co-op. Supp. 1982); Me. Rev. Stat. Ann. Titl. 35, § 4103(1)(B) (Supp. 1982); N.C. Gen. Stat. § 159B-12 (1982); Va. Code § 15.1-1611 (1981). Vermont had indicated the extraordinary nature of these obligations by enacting specific legislation, although it does not apply to the Vermont Participants. *See* 30 Vt. Stat. Ann. § 5013 (1986). Indeed, the authority of MMWEC itself to make such arrangements is conferred by its enabling legislation in Massachusetts. *See* Mass. Comp. Laws Ann., ch. 164 App., § 1-6(a) (1976). Others have brought test cases to confirm the validity of these arrangements. *See e.g.*, *Johnson v. Piedmont Municipal Power Agency*, 287 S.E.2d 476 (S.C. 1982); *Frank v. City of Cody*, 572 P.2d 1106

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[9] *See Chemical Bank v. Washington Public Power Supply System*, 99 Wash.2d 772, 666 P.2d 329 (1983); *Chemical Bank v. Washington Public Power Supply System*, 102 Wash.2d 874, 691 P.2d 524 (1984), *cert. denied*, 471 U.S. 1065, 1075 (1985); *Frank v. City of Cody*, 572 P.2d 1106 (Wyo. 1977); *DeFazio v. Washington Public Power Supply System*, 296 Or. 550, 679 P.2d 1316 (1984); *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983). While cases denying the validity of take-or-pay contracts were decided subsequent to execution of the PSAs, the fact that in other jurisdictions cases were brought to test their validity prior to execution of similar documents suggests a general unease in the public power community about the validity of such arrangements in the absence of specific enabling legislation.

(Wyo. 1977); *State ex rel. Mitchell v. City of Sikeston*, 555 S.W.2d 281 (Mo. 1977).

MMWEC and its representatives—underwriters, bond counsel, and financial advisors—were sophisticated participants in the area of public power. Given the novelty of hell-or-high water arrangements in Vermont, it was forseeable that a reviewing court could find the PSAs invalid, and MMWEC cannot now claim any loss of reasonable expectation.[10]

B. *Invalidation of the PSAs Does Not Discriminate Against Interstate Commerce*

Petitioner does not cite a single case in which any court has deemed the judicial act of declaring law to fall within, much less violate, the Commerce Clause. None of the cases of protectionism cited by Petitioner involves judicial decisions at all, much less one interpreting a novel and controversial financing scheme that sought to curtail the authority of a state's localities. To the contrary, this Court's pronouncements on the scope of the Commerce Clause consistently refer to state *legislative* or *administrative* action. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981) (in-state firms provide a "powerful safeguard against legislative abuse" of out-of-state firms with similar interests).

Even if the Commerce Clause did implicate judicial decisions, no violation arises simply because the action happens to involve a party from another state. The Vermont Supreme Court imposed no burden on MMWEC that it does not apply with equal force to domestic entities which contract with political subdivisions. No contracting party may, without explicit legislative authorization, usurp local fiscal and legislative au-

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[10] Note that Petitioner does not claim that it received or relied on any assurances by the Vermont Participants of the validity of the hell-or-high water obligation.

thority. This limitation prevails whether the contracting party is the Attorney General of Vermont, *see Thompson v. Smith*, 119 Vt. 488, 501, 129 A.2d 638 (1957) (non-delegation doctrine is a "deep-rooted principle of law"); a privately-owned utility within the state; or a foreign corporation such as MMWEC. The non-delegation doctrine protects local residents by requiring that elected officials exercise the discretion entrusted to them, and guards the integrity of the democratic process by ensuring that important local decisions are made by those politically accountable. Application of the doctrine is unequivocally *not* the kind of protectionist act that suggests a state is favoring its own residents over those of another jurisdiction to gain economic advantage. Nothing in the Vermont Supreme Court's opinion, and nothing Petitioner points to in Vermont law, prohibits MMWEC from selling electric capacity and energy to Vermont localities on the exact same terms available to Vermont suppliers or otherwise imposes on MMWEC burdens not applied to in-state corporations.

There would be no claim here even if the judicial decision of the Vermont Supreme Court were the sort of state action that affected interstate commerce. The Commerce Clause does not bar all conduct that affects interstate commerce. Rather, "(w)here [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 374, 393-94 (1983), *quoting Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).[11] Vermont has a compelling interest to maintain accountability between the officials of its

[11] Note that this Court's statement again refers to potential Commerce Clause violations that arise from policies embodied in "statute," not common law.

political subdivisions and their constituents. The related burden is minimal; those who would contract with Vermont localities but who fear that the need to respect the autonomy of those localities increases contractual risks may seek prices that compensate fairly for any risks they perceive. They may not, however, contractually usurp the authority of those localities. Since these principles apply "even handedly" to siutations wholly intrastate in character as well as those that incidentally affect interstate commerce, any incidental effect on interstate commerce is an acceptable burden. *See e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 471-72.

The cases cited by Petitioner to demonstrate a Commerce Clause violation are simply inapposite. *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), involved an attempt by New Hampshire to retain for itself the benefits of state resources to the exclusion of non-residents. The embargo on export of the state's resources stands in marked contrast to the instant case. Here, of course, Vermont is an importer of power, not an exporter. Thus it is difficult to discern the type of "exportation ban" that comprised the unconstitutional protectionist regulation in *New England Power*. *See* 455 U.S. at 339. Nothing in the Vermont Supreme Court opinion bars or disadvantages interstate trade in energy and capacity.

Middle South Energy, Inc. v. Arkansas Public Service Commission, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986), provides no greater support for Petitioner. While that opinion does apply the Commerce Clause to the importation of electricity, it does so under circumstances with little analogue to the instant situation.[12] The Eighth Circuit found evidence in the record

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[12] The result in *Middle South* is better explained on preemption grounds. *See Mississippi Light & Power Co. v. Mississippi ex rel. Moore*, —— U.S. ——, 108 S. Ct. 2428 (1988). *Middle South* and *Mississippi Light* are parallel cases which involved the same whole-

that made the state public service commission's discriminatory purpose of economic protectionism "abundantly plain." *See* 772 F.2d at 416. The sole basis for the commission's rejection of the contracts involved in that case was to shift the economic impact of the transaction from Arkansas to out-of-state ratepayers. The record here is empty of any similar purpose. Indeed, the Vermont trial court *upheld* the PSAs, notwithstanding the financial burden they imposed on Vermont ratepayers. The Supreme Court of Vermont reversed on reasoning that disavowed any distinction between projects that return benefits to Vermont commensurate with burdens and those that do not. Petition App. 22a-23a.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Vermont should be denied.

Respectfully submitted,

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July 10, 1989

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sale electric purchase arrangements subject to the same FERC order. In *Mississippi Light*, the Court made clear that the state actions in question were invalid because they were preempted by the FERC order.

APPENDICES

APPENDIX A

[EXECUTIVE COPY]

MASSACHUSETTS MUNICIPAL WHOLESALE
ELECTRIC COMPANY
(A Public Corporation)

PROJECT NO. 6

POWER SALES AGREEMENT

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MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY

POWER SALES AGREEMENT

THIS AGREEMENT is executed by the Massachusetts Municipal Wholesale Electric Company ("MMWEC"), a political subdivision of the Commonwealth of Massachusetts, and the city or town of the Commonwealth of Massachusetts, or other electric utility, which has executed this Agreement (the "Participant").

WHEREAS, MMWEC has heretofore been duly organized as a body politic and corporate and political subdivision of the Commonwealth of Massachusetts under the laws of said Commonwealth (Mass. Stats. 1975, Ch. 775) and is authorized, among other things, jointly or separately to plan, finance, acquire, construct, improve, purchase, operate, maintain, use, share costs of, own, lease, sell, dispose of or otherwise participate in electric power facilities or portions thereof within or without said Commonwealth, to sell electric power and energy and other products of electric power facilities to member and nonmember cities and towns having municipal electric departments established under Chapter one hundred and sixty-four of the General Laws or a special act and to other utilities, public and private, within or without said Commonwealth and, subject to the approval of the Department of Public Utilities of the Commonwealth, to borrow money by the issue of bonds for any of its corporate purposes; and

WHEREAS, the Participant owns, operates and maintains one or more plants for the manufacture or distribution of electricity;

WHEREAS, MMWEC proposes to obtain an ownership interest in electric power facilities (the "Project") described in Exhibit B, attached hereto; and

WHEREAS, MMWEC proposes to sell, and the Participant proposes to purchase, its Participant's Share (hereinafter defined) of Project Capability (hereinafter defined), all as hereinafter provided:

NOW, THEREFORE, the parties hereto mutually agree as follows:

1. *Definitions.*

The singular of any term defined in this Agreement shall encompass the plural, and the plural the singular, unless the context indicates otherwise.

(a) "Annual Budget" means the budget adopted by MMWEC pursuant to Section 5(a) of this Agreement which itemizes the estimated Monthly Power Costs of the Project during a Contract Year, or, in the case of an amended Annual Budget, during the remainder of a Contract Year.

(b) "Billing Statement" means the written statement prepared monthly by MMWEC and delivered to the Participant which shows the amounts to be paid for such month to MMWEC by the Participant as the Participant's Share of the Monthly Power Costs as set forth in an Annual Budget or an amended Annual Budget.

(c) "Bonds" means any bonds, notes or other evidences of indebtedness issued from time to time pursuant to and under authority of the Bond Resolution, (i) to pay the Costs of Acquisition and Construction of the Project, and (ii) for the purposes authorized by Section 14 of this Agreement.

(d) "Bond Resolution" means the General Bond Resolution of MMWEC, adopted August 26, 1976, as from time to time amended or supplemented by Supplemental Resolutions.

(e) "Contract Year" means the 12-month period commencing 2400 hours Local Time on June 30 of each year

during the term of this Agreement and ending 2400 hours Local Time on the June 30 next following, *provided*, that the first Contract Year shall commence at 2400 hours Local Time on the date immediately preceding (i) the earliest of the Dates of Commercial Operation of the Facilities, or (ii) the date to which interest is capitalized on all of the Bonds issued to finance the Costs of Acquisition and Construction of the Project but not later than one year prior to the first principal installment date for such Bonds, or (iii) the date one year after the date of termination of any of the Facilities as provided in Section 10, whichever is earliest, and the last Contract Year shall end at 2400 hours Local Time on the date of termination of this Agreement as provided in Section 2 of this Agreement.

(f) "Costs of Acquisition and Construction" shall mean, to the extent not included in Monthly Power Costs, all costs of determining the feasibility of and acquiring, constructing, financing, carrying out and placing in operation the Project, heretofore or hereafter paid or incurred by MMWEC, and shall include, but shall not be limited to, funds required for:

(1) working capital and reserves in such amounts as may be deemed necessary by MMWEC;

(2) interest accruing in whole or in part on Bonds prior to and during acquisition and construction and for such additional period as MMWEC may reasonably determine;

(3) acquisition of fuel including land, rights, leases and options therefor and working capital, equipment, structures, facilities or prepayments and reserves therefor;

(4) the deposit or deposits from the proceeds of Bonds in any fund or account established pursuant to the Bond Resolution to meet reserve requirements for Bonds;

(5) the deposit or deposits from the proceeds of Bonds in any funds or accounts established pursuant to the Bond Resolution as reserves for renewals, replacements and contingencies, and for decommissioning or termination;

(6) all federal, state and local taxes and payments in lieu of taxes legally required to be paid in connection with the acquisition and construction of the Project;

(7) all costs relating to injury and damage claims arising out of the acquisition and construction of the Project;

(8) the payment of the principal of and premium, if any, and interest on notes or other evidences of indebtedness issued in anticipation of the issuance of Bonds for the payment of the Costs of Acquisition and Construction of the Project;

(9) preliminary survey, investigation and development costs, engineering, contractors' fees, permits, licenses and approvals, labor, materials, equipment, lands, rights of way, franchises, easements and other interests in land, utility services and supplies, payments to other public agencies, training and testing costs, insurance premiums, fees and expenses of trustees and paying agents, legal and financing costs, administrative and general costs, and all other costs incurred by MMWEC and properly allocable to the acquisition and construction of the Project and carrying out and placing the same in operation; and

(10) All costs relating to the study and development of Electric Power Facilities listed in paragraph 2 of Exhibit B; *provided*, that (i) an aggregate amount not in excess of the amount listed in Exhibit B derived from the proceeds of Bonds issued to finance the Costs of Acquisition and Construction of

the Project may be expended for such costs, (ii) any such amount expended for such Electric Power Facilities for which bonds, notes or other evidences of indebtedness are issued pursuant to and under authority of the Bond Resolution shall be reimbursed to the Project from the first such bonds, notes or evidences of indebtedness issued, and (iii), subject to the preference rights of MMWEC members set forth in Article I. Section 5, of the By-Laws of MMWEC, the Participants shall have the first right to purchase all electric capacity and energy generated by any such Electric Power Facility, pro rata among those exercising such right, before such a disposition is made to an electric utility which is not a Participant. All Participants who are members of MMWEC hereby waive any preference right set forth in said By-Laws and not otherwise provided herein. Additionally, MMWEC will use its best efforts to obtain similar waivers of preference rights from its members who are not Participants or agreements with such members for the advancement of funds for the purposes listed in paragraph 2 of Exhibit B.

Any amounts received pursuant to clause (ii) of the preceding paragraph shall be applied to payment of Costs of Acquisition and Construction of the Project or, at the option of MMWEC, to payment of additional costs for the purposes listed in paragraph 2 of Exhibit B, if received prior to the date the construction fund for the Project to be established pursuant to the Bond Resolution is closed, or to the purchase or earliest possible redemption of Bonds issued for the Project, if received thereafter.

(g) "Date of Commercial Operation" and words of like import shall mean the date upon which a Facility is first ready for normal continuous operation as determined pursuant to an ownership agreement applicable thereto, in the case of any Facility jointly owned, if any,

and by MMWEC in the case of any Facility solely owned by MMWEC.

(h) "Electric Power Facility" shall mean any system or facilities for the generation, transmission or transformation of electric power and energy by any means whatsoever, including, without limiting the generality of the foregoing, facilities for processing refuse or other materials into fuel, with or without other by-products.

(i) "Facility" means any one of the Electric Power Facilities described in paragraph 1 of Exhibit B, attached hereto.

(j) "Monthly Power Costs" shall mean all of MMWEC's costs, to the extent not included in the Costs of Acquisition and Construction, resulting from the ownership, operation, maintenance and termination of, and necessary repairs, renewals, replacements and additions to, the Project, including but not limited to the following items of cost that are paid or incurred by MMWEC during each month of each Contract Year in connection with the Project:

(1) the amount (calculated without reference to acceleration for default under the Bond Resolution) which MMWEC is required under the Bond Resolution to pay or deposit during such month from the Revenue Fund into the Bond Fund established by the Bond Resolution for the credit of the Interest Account, Principal Account or Bond Retirement Account for the payment of the principal of and premium, if any, on the Bonds when due, and interest on principal until such principal is due:

(2) the amount equal to 10% of the amount in item (1) above (calculated before credit for investment earnings) which may be deposited in funds created under the Bond Resolution and be available under circumstances described therein for the Proj-

ect and other projects in which the Participants may not have an interest;

(3) the amount to be paid in such month under Section 13 hereof into the Study and Development Fund established by the Bond Resolution and the amount to be paid or set aside in such month with respect to the Project in a fuel fund, if any, established by the Bond Resolution;

(4) the amount which may be required by MMWEC during such month to pay the costs of (i) renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project necessary to achieve design capability, or required by any governmental agency or authority, (ii) any renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project which in the opinion of the Consulting Engineer appointed and retained by MMWEC under the Bond Resolution are necessary or desirable to improve operating reliability or to reduce unit power costs, and any acquisition of fuel for the Project, (iii) renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project for which MMWEC shall be responsible under any ownership agreement relating to the Project, and (iv) extraordinary operation and maintenance costs of, including extraordinary costs of fuel, and the cost of preventing or correcting any unusual loss or damage (including major repairs) to, the Project or any part thereof, all to the extent that MMWEC is not reimbursed for the payment of the costs set forth in clauses (i)-(iv) from the proceeds of insurance, or funds for such payment are not available to MMWEC therefor from any funds set aside with respect to the Project in the Reserve and Contingency Fund established under the Bond Resolution or funds for such payment are not provided or to be provided

by the issuance of Bonds pursuant to Section 14 of this Agreement;

(5) the payment of the principal of and premium, if any, and interest on notes or other evidences of indebtedness issued in anticipation of the issuance of Bonds for the payment of the Costs of Acquisition and Construction of the Project or for the purposes specified in Section 14 of this Agreement;

(6) the costs of producing and delivering power and energy from the Project during such month (including, but not limited to, fuel, ordinary operation, maintenance and repair costs and working capital and reserves deemed necessary therefor by MMWEC, administrative and general expenses, insurance and overhead) not included in the costs hereinbefore specified and properly chargeable to the Project;

(7) the retirement from service, decommissioning and termination of the Project; and

(8) At the option of MMWEC, in the event the Date of Commercial Operation of a Facility occurs prior to the date to which interest is capitalized on any Bonds issued to finance the Costs of Acquisition and Construction of the Project, an amount not to exceed the interest accruing from such Date of Commercial Operation to such date to which such interest is capitalized, and the Participant agrees pursuant to Section 5.4 of the Bond Resolution that, notwithstanding Section 5(h) of this Agreement, any such amount which is excess under said Section 5.4 shall be applied as soon as practicable to payment of Costs of Acquisition and Construction or, at the option of MMWEC, to the purchase or earliest possible redemption of Bonds issued for the Project.

(k) "New England Power Pool" means the power pool created by the New England Power Pool Agreement.

(l) "New England Power Pool Agreement" means a contractual agreement among electric utilities in New England which agreement constitutes the central dispatching and primary pooling arrangement for electric utilities in the New England states.

(m) "Participants" means those entities which are specified in Exhibit A, attached hereto, and which enter into a Power Sales Agreement.

(n) "Participant's Share" means the percentage of Project Capability set opposite the name of the Participant in Exhibit A, attached hereto, adjusted as provided in Sections 3 and 12 of this Agreement.

(o) "Power Sales Agreements" means this Agreement and all other agreements substantially identical to this Agreement entered into by MMWEC and the Participants with respect to the Project.

(p) "Project" means MMWEC's ownership interest in the Electric Power Facilities described in paragraph 1 of Exhibit B, attached hereto.

(q) "Project Capability" means the amounts of electric capacity and energy, if any, which the Project is capable of producing at any particular time (including times when the Project is not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses, and shall be determined in accordance with the New England Power Pool Agreement, if any, and otherwise in accordance with Prudent Utility Practice.

(r) "Prudent Utility Practice" at a particular time means any of the practices, methods and acts (including but not limited to the practices, methods and acts engaged in or approved by a significant portion of the electrical utility industry prior thereto) which, in the

exercise of reasonable judgment in the light of the facts known at the time the decision was made, would have been expected to accomplish the desired result at the lowest reasonable cost consistent with reliability, safety and expedition. Prudent Utility Practice shall apply not only to functional parts of the Project but also to appropriate structures, landscaping, painting, signs, lighting, or facilities and public relations programs reasonably designed to promote public enjoyment, understanding and acceptance of the Project. Prudent Utility Practice is not intended to be limited to the optimum practice, method or act, to the exclusion of all others, but rather to be a spectrum of possible practices, methods or acts. In evaluating whether any matter conforms to Prudent Utility Practice, the parties shall take into account (i) the fact that MMWEC is a body politic and corporate and a political subdivision under the laws of the Commonwealth of Massachusetts, with the statutory duties and responsibilities thereof (ii) the objectives to integrate the Project Capability with the generating resources of the Participants, including such resources and electric capacity and energy purchased under contract, to achieve optimum utilization of the resources and achieve efficient and economical operation of each system, (iii) the New England Power Pool Agreement, if any, and (iv), in the case of any Facility jointly owned, the applicable ownership agreement between the owners of the Facility.

2. *Term of Agreement.*

This Agreement shall be effective upon execution and delivery of Power Sales Agreements by MMWEC and Participants whose Participants' Shares total 100.0%. This Agreement shall terminate when (i) all of the Facilities have been terminated as provided in Section 10 of this Agreement, (ii) the principal of and premium, if any, and interest on all of the Bonds have been paid or funds set aside for the payment or retirement thereof

in acordance with the Bond Resolution and (iii) all other obligations and liabilities hereunder have been paid or provided for.

3. *Financing, Design, Acquisition, Construction, Operation and Maintenance of the Project.*

(a) MMWEC, in good faith and in accordance with Prudent Utility Practice, shall, subject, however, in the case of any jointly owned Facility, to the provisions of the applicable ownership agreement between the owners of the Facility, use its best efforts: (i) to arrange for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the Project; (ii) to obtain, or arrange for obtaining, permits and other rights and regulatory approvals necessary for the financing, planning, engineering, design, acquisition, construction, operation and maintenance of the Project; and (iii) to issue and sell Bonds to finance the Costs of Acquisition and Construction of the Project, and to finance the costs of any necessary renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project, not otherwise provided for, *provided*, that in each such case Bonds may then be legally issued and sold.

(b) In order to enable MMWEC to issue and sell Bonds to finance the Costs of Acquisition and Construction of the Project, each Participant must satisfy the criteria established in subparagraphs (1), (2) and (3) of paragraph F of Section 2.3 of the Bond Resolution. MMWEC may from time to time request from the Participants such information or documents as MMWEC deems to be required to demonstrate the Participants' ability to satisfy such criteria and so as to enable Bonds to be issued on such issuance date as shall be specified by MMWEC concurrently with the request. MMWEC will provide assistance to the Participants in obtaining such information and documents. The Participants shall

deliver to MMWEC all such information and documents by no later than thirty days after the date of such request. If the Board of Directors of MMWEC finds with respect to a Participant either that all such information and documents were not delivered as aforesaid or that the same demonstrates that such Participant will, on or within a reasonable time after the specified issuance date, be unable to satisfy the criteria necessary under said subparagraphs (1), (2) and (3) so as to enable the Bonds to be issued on or within a reasonable time after such date, then in such event the Participant agrees that all of its interest herein (including its Participant's Share of Project Capability) may be assigned, transferred and sold by MMWEC on behalf of the Participant to one or more other electric utilities and upon any such disposition the Participant shall be relieved of all liability and shall have no further obligations hereunder, except as to accrued liabilities and obligations, anything in Section 21 of this Agreement to the contrary notwithstanding; *provided*, that (i) no such disposition shall be effective if the Bonds are not issued within four months of the specified issuance date, (ii) the other Participants shall have the first right to accept each such disposition, pro rata among those exercising such right, before such a disposition is made to an electric utility which is not a Participant and (iii) no such disposition shall be made if in the opinion of counsel to MMWEC the same would adversely affect the exemption from Federal income taxation of the interest on the Bonds. If a Participant accepts a disposition as aforesaid, its Participant's Share as so increased shall be its Participant's Share for all purposes of this Agreement, including but not limited to Section 12(d) of this Agreement. Any reference in this paragraph to subparagraphs (1), (2) and (3) of paragraph F of Section 2.3 of the Bond Resolution and to Bonds shall also be deemed to refer to any comparable provisions of any bond resolution or similar document pursuant to which MMWEC may issue bonds, notes or

other obligations to finance electric generation or transmission facilities.

(c) The Participant hereby approves MMWEC's estimate of the Costs of Acquisition and Construction of the Project, a copy of which estimate is on file with the Participant. MMWEC shall deliver revised estimates of the Costs of Acquisition and Construction of the Project to the Participant from time to time to reflect substantial changes in construction schedules, plans, specifications, or costs, subject, however, in the case of any jointly owned Facility, to the provisions of the applicable ownership agreement between the owners of the Facility.

(d) MMWEC shall, subject, however, in the case of any jointly owned Facility, to the provisions of the applicable ownership agreement between the owners of the Facility, operate and maintain the Project, or cause the Project to be operated and maintained, in accordance with Prudent Utility Practice and so as to meet the requirements of government agencies having jurisdiction.

4. *Sale and Purchase of Participant's Share.*

MMWEC hereby sells, and the Participant hereby purchases, its Participant's Share of Project Capability. The amounts to be paid for each Contract Year by the Participant to MMWEC for its Participant's share of Project Capability shall be its Participant's Share of the Monthly Power Costs for such Contract Year.

5. *Payments by the Participant; Sources of Such Payments.*

(a) At least 90 days prior to each Contract Year, MMWEC shall deliver to the Participant an Annual Budget for the Contract Year. During each Contract Year, MMWEC shall review at least quarterly its Annual Budget for the remainder of the Contract Year. In the event such or any other review indicates that such

Annual Budget will not substantially correspond with actual Monthly Power Costs, or if at any time during such Contract Year there are or are expected to be extraordinary receipts, credits or costs substantially affecting the Monthly Power Costs, MMWEC shall prepare and deliver to the Participant an amended Annual Budget applicable to the remainder of such Contract Year. The Annual Budgets shall, in the case of any jointly owned Facility, conform to the applicable ownership agreement between the owners of the Facility.

(b) On or before the 1st day of each month of each Contract Year, MMWEC shall prepare and deliver to the Participant a Billing Statement showing the amount payable by the Participant as the Participant's Share of the Monthly Power Costs, as shown in the Annual Budget for such Contract Year or in an amended Annual Budget for the remainder of such Contract Year. The amounts shown in the Billing Statement to be paid to MMWEC by the Participant shall be due and payable on the twentieth day of the month, and any amounts due and not paid by the Participant on or before the close of business on the 20th day of the month shall bear interest until paid at the rate of 1½% per month. Remittances received by mail will be accepted without assessment of said charges, provided that the postmark indicates that the payment was mailed on or before such day. If the 20th day of the month is a Sunday or other non-business day of the Participant, the next following business day shall be the last day on which payment may be mailed without addition of said charges.

Fuel charges shall be shown on the Billing Statement as a separate line item providing the necessary information with respect thereto is available to MMWEC.

(c) The Participant shall not be required to make any payments to MMWEC under this Agreement except from the revenues and other moneys derived by the Participant

from its electric department or system. The Participant covenants and agrees that it will fix, revise and collect fees or charges for electric power and energy and other services, facilities and commodities sold, furnished or supplied through its electric department or system at least sufficient to provide revenues adequate to meet its obligations under this Agreement and to pay any and all other amounts payable from or constituting a charge and lien upon such revenues, including amounts sufficient to pay the principal of and interest on all bonds issued by the Participant for electric purposes.

(d) The Participant shall make the payments to be made to MMWEC under this Agreement whether or not the Project or any Facility thereof is undertaken, completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of the Project or any Facility thereof for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance by MMWEC or any other Participant under this or any other agreement or instrument, the remedy for any non-performance being limited to mandamus, specific performance or other legal or equitable remedy.

(e) The Participant shall not have the right to challenge any bill, invoice or statement rendered by MMWEC, invoke arbitration of the same or bring any court or administrative action of any kind questioning the propriety of the same after a period of twenty-four months from the date of rendering. In the case of a bill, invoice or statement containing estimates, the Participant shall not have the right to challenge its accuracy after a period of twenty-four months from the date of its adjustment to reflect the actual amounts due.

(f) The Participant shall not issue bonds, notes or other evidences of indebtedness payable from and secured

by a lien on the revenues derived from the ownership or operation of its electric system without providing for the payment of operating expenses (including Monthly Power Costs hereunder) from such revenues ahead of debt service on such bonds, notes or other evidences of indebtedness unless an independent consulting engineer or engineering firm or corporation having a national and favorable reputation for special skill, knowledge and experience in analyzing the operations of electric utility systems certifies that the facilities, for the financing of which the bonds, notes or other evidences of indebtedness are being issued, are (or were when the Participant committed itself to them by contract or financing) reasonably expected to properly and advantageously contribute to the conduct of the business of the electric system of the Participant in an efficient and economical manner consistent with prudent management. This paragraph (f) shall not apply to bonds, notes or other evidence of indebtedness issued to meet obligations under joint ownership agreements to which the Participant is a party on the date hereof, or to refund bonds, notes or other evidences of indebtedness heretofore issued, or hereafter issued in compliance herewith, payable from and secured by a lien on revenues in priority to operating expenses.

(g) MMWEC shall apply, as a credit against Monthly Power Costs, all available receipts, revenues and other moneys received by it from insurance proceeds, the sale of surplus Project equipment, materials and supplies, interest earned on investments if and to the extent not credited against the Cost of Acquisition and Construction and any other moneys to be credited thereto under the Bond Resolution.

(h) On or before one hundred twenty days after the end of each Contract Year MMWEC shall submit to the Participant a statement of the actual aggregate Monthly Power Costs for such Contract Year. If the Participant's Share of such actual aggregate Monthly Power Costs and

any other amounts payable for such Contract Year exceed the amounts on the basis of which the Participant has been billed, the deficiency shall be added to the next succeeding Billing Statement or at MMWEC's discretion spread over the remainder of the then current Contract Year. If the actual aggregate Monthly Power Costs or other amounts payable for such Contract Year are less than the amounts on the basis of which the Participant has been billed, MMWEC shall credit such balance on the next succeeding Billing Statement, or by agreement of the Participant and MMWEC on the Billing Statements delivered to the Participant for the remainder of the then current Contract Year.

(i) In the event of the application of amounts allocated to the Project in the Reserve and Contingency Fund under the Bond Resolution to the payment of costs allocable to other projects, amounts thereafter paid on account of such other projects for deposit in the Reserve and Contingency Fund shall be credited pro rata on the next succeeding Billing Statements delivered to the Participants to the extent necessary to reimburse the Participants (without interest) from surplus moneys under the Bond Resolution for any credit lost by the Participants as a result of such event. If any credit under this Agreement exceeds the amount due from the Participant in any month, the excess shall be paid to the Participant. In the event of the application of moneys allocable to other projects in the Reserve and Contingency Fund to costs allocable to the Project, the Participants shall continue to make payments for deposit in the Reserve and Contingency Fund without reduction on account of any termination or reduction of debt service or otherwise until the participants in such other projects have been similarly reimbursed. To the extent practicable, MMWEC shall include a similar requirement in other power sales agreements for the benefit of the Participants. Subject to the Bond Resolution, MMWEC shall generally exercise

its powers, insofar as practicable, so as to restore to the Participant any credit or other benefit lost as the result of any default by any other person or as the result of the use of moneys attributable to the Project under the Bond Resolution for the purposes of other projects.

6. *Accounting.*

MMWEC shall keep accurate records and accounts for the Project substantially in accordance with the rules and regulations of the Department of Public Utilities of the Commonwealth, separate and distinct from its other records and accounts. Such records and accounts shall contain information supporting the allocation of MMWEC's indirect costs associated with the Project. Such records and accounts shall be audited annually by a firm of certified public accountants, experienced in electric utility accounting and of national reputation, to be employed by MMWEC. Such records and accounts and such annual certified audit, including all written comments and recommendations of such accountants, shall be made available for inspection by the Participant at any reasonable time.

The Participant shall, at the time of the filing of the return required by law and the rules and regulations of the Department of Public Utilities of the Commonwealth, of any similar regulatory agency of any other State or of any other appropriate regulatory agency, file a copy of such return with MMWEC.

The Participant shall, in each fiscal year, file with MMWEC financial statements for the first six months and for the entire twelve months of such year. Such statements shall be so filed within sixty days after the close of the applicable period or, in the case of the twelve-month statements, within any longer period permitted for the filing thereof with the Department of Public Utilities

of the Commonwealth or similar regulatory agency of any other State.

The Participant shall provide to MMWEC such other certificates, statements and information as MMWEC shall reasonably require, including those required in connection with its financings.

7. *Dispatch; Metering; Deliveries; Transmission.*

The Project shall be dispatched in accordance with the New England Power Pool Agreement, if any, and otherwise in accordance with Prudent Utility Practice. If the Participant is not a member of the New England Power Pool, it shall arrange with the New England Power Pool, or other electric utilities, for dispatch services related to the Participant's Share of Project Capability. If and to the extent that outage information is not available to the Participant from the New England Power Pool, MMWEC shall promptly notify the Participant of the outage.

Electric power and energy to be furnished hereunder shall be alternating current, three phase, sixty hertz. The point(s) of delivery, point(s) of measurement, metering ownership and special conditions of service shall be as set forth in Exhibit C hereto attached. Exhibit C may be amended from time to time to include such other point or points of delivery and measurement and any other provisions pertaining to conditions of service as may be agreed upon by MMWEC and the Participant. To the extent metering information is not directly available to the Participant, MMWEC shall furnish such metering information as may be reasonably requested by the Participant to the extent such information is available to MMWEC.

The Participant shall be responsible and arrange for the transmission of capacity and energy sold under this agreement between the Electric Power Facility and its system, including the installation and maintenance of

facilities required for it to receive such electric capacity and energy into its system. MMWEC may, at its option, elect to deliver the capacity and energy from the Project or a portion thereof to a delivery point on the Participant's system. In any event, the Participant shall be responsible for all transmission and transformation losses and costs incurred with respect to the Participant's Share of Project Capability between the Project and its system.

8. *Insurance.*

MMWEC shall maintain in force, for the benefit of the Project and the Participants as their respective interests shall appear, as a Project expense, such insurance as will satisfy the requirements of the Bond Resolution and applicable statutes and regulations thereunder, and such other insurance as MMWEC may deem desirable. Subject to Section 10 of this Agreement and the provisions of the Bond Resolution, any proceeds of such insurance received by MMWEC for loss or damage to the Project shall be used to repair the Project.

9. *Training.*

MMWEC shall carry out a familiarization and training program to maintain adequate staff for the Project and the expenses thereof shall be part of the direct or indirect Costs of Acquisition and Construction or Monthly Power Costs as appropriate.

10. *End of the Project; Termination Settlement.*

As to any Facility solely owned by MMWEC, MMWEC shall comply with the provisions of subparagraphs (i), (ii) and (iii), and as to any Facility jointly owned by MMWEC, subject to the agreement between the owners of such Facility, MMWEC shall comply with the provisions of subparagraphs (i), (ii) and (iii) in substantially the same manner as if the Facility were wholly owned by MMWEC.

(i) A Facility shall be terminated and MMWEC shall cause it to be salvaged, discontinued, decommissioned, and disposed of or sold in whole or in part in such manner as MMWEC may determine when:

(A) MMWEC determines that it is unable to construct, operate or proceed as owner of such Facility due to licensing, or operating conditions or other causes which are beyond its control.

(B) MMWEC determines that such Facility is not capable of producing energy consistent with Prudent Utility Practice.

The date of termination shall be the earlier of the dates of the termination under subparagraphs (A) and (B).

(ii) After such termination, MMWEC shall undertake the decommissioning of such Facility. MMWEC shall make monthly accounting statements to the Participant of all costs associated therewith. Such monthly accounting statements shall continue until such Facility has been salvaged, discontinued, decommissioned and finally disposed of hereunder, at which time a final accounting statement shall be made by MMWEC and such final accounting statement shall be made at the earliest reasonable time. The costs of decommissioning shall include, but shall not be limited to, all of MMWEC's accrued costs and liabilities resulting from MMWEC's ownership, construction, operation (including cost of fuel), maintenance of and renewals and replacements to such Facility and the costs of salvage, discontinuance and disposition or sale thereof.

(iii) The final accounting statement shall credit to the Participants, and deduct from any amount otherwise chargeable to them, the fair market value of any assets related to any Facility then retained

by MMWEC. If the final accounting statement shows that the costs referred to in subparagraph (ii) above exceed such credits after application by MMWEC of all other funds available for such purpose, the Participant shall pay MMWEC a sum determined by multiplying the amount shown to be due in MMWEC's final accounting statement by the Participant's Share. If the final accounting statement shows a balance of credits to the Participants, MMWEC shall pay the same to the Participants.

11. *Sale of Excess Participant's Share.*

In the event that the Participant shall determine that all or any part of the Participant's Share of the Project Capability is in excess of the requirements of the Participant, the Participant shall notify MMWEC of such determination and MMWEC shall use its best efforts to sell and transfer for any period of time all or part of such excess. The other Participants shall have the first right to accept each such disposal pro rata among those exercising such right before a transfer is made to an electric utility which is not a Participant. If all or any portion of such excess of the Participant's Share of Project Capability is sold pursuant to this section, the Participant's Share shall not be reduced, and the Participant shall remain liable to MMWEC to pay the full amount of its Participant's Share of Monthly Power Costs as if such sale had not been made, except that such liability shall be discharged to the extent that MMWEC shall receive payment for such excess Project Capability from the purchaser or purchasers thereof.

12. *Obligations in the Event of Default.*

(a) Upon failure of the Participant to make any payment in full when due under this Agreement or to perform any obligation herein, MMWEC shall make demand upon the Participant, and if said failure is not cured

within 20 days from the date of such demand it shall constitute a default at the expiration of such period. Notice of such demand shall be provided to the other Participants by MMWEC.

(b) If the Participant in good faith disputes the legal validity of said demand, it shall make such payment or perform such obligation within said 20 day period under protest directed to MMWEC. Such protest shall specify the reasons upon which the protest is based.

(c) Upon the failure of any Participant to make any payment which failure constitutes a default under this Agreement, MMWEC shall use its best efforts to sell and transfer all or a portion of such Participant's Share for all or a portion of the remainder of the term of this Agreement. The other Participants shall have the first right to accept each such disposal pro rata among those exercising such right before a transfer is made to an electric utility which is not a Participant. If all or any portion of the Participant's Share is transferred pursuant to this paragraph, the Participant's Share shall not be reduced, and the Participant shall remain liable to MMWEC to pay the full amount of its Participant's Share of Monthly Power Costs as if such sale had not been made, except that such liability shall be discharged to the extent that MMWEC shall receive payment from the purchaser or purchasers thereof.

(d) Upon failure of any other Participant(s) to make any payment which failure constitutes a default under this Agreement, and except as transfers are made pursuant to paragraph (c), the Participant's Share shall be automatically increased for the remaining term of this Agreement pro rata with that of the other non-defaulting Participant(s) and the defaulting Participant's(s') Share(s) shall be reduced correspondingly; *provided*, that no such reduction shall reduce the defaulting Participant's(s') obligations under paragraph (e); and further *provided*, that the sum of such increases for the Partici-

pant pursuant to this paragraph shall not exceed, without consent of the Participant, an accumulated maximum of 25% of the Participant's Share prior to any such increases.

(e) If the Participant shall fail or refuse to pay any amounts due to MMWEC hereunder, the fact that other Participants have assumed the obligation to make such payments shall not relieve the Participant of its liability for such payments, and any Participants assuming such obligation, either individually or as a member of a group, shall have a right of recovery from the Participant (diminished to the extent such Participants have received value from the concomitant rights and interests). MMWEC or any Participant as their interests may appear, jointly or severally, may commence such suits, actions or proceedings, at law or in equity, including suits for specific performance, as may be necessary or appropriate to enforce the obligations of this Agreement against the Participant.

13. *Development Work.*

The Billing Statement may also show, as an amount to be paid as part of the Monthly Power Costs in the month to which the Billing Statement applies, a sum to be used to pay the cost of work in connection with the development of Electric Power Facilities to serve the needs of cities and towns of the Commonwealth having municipal electric departments, including, but not limited to, planning, engineering, siting, environmental, financial and economic surveys, studies and work; the acquisition of options to acquire real estate; payments with respect to fuel; and any other costs and expenses incurred in connection with the planning, construction and acquisition of any Electric Power Facility or an ownership interest therein and the placing of the same in operation (herein referred to as "Development Work"). Such amount shall be shown in the Annual Budget and may not exceed 1% of the

Participant's Share of the amount described in subparagraph (1) of paragraph (j) of Section 1 hereof (calculated before credit for investment earnings). Such amounts when received by MMWEC shall be deposited in the Study and Development Fund established by the Bond Resolution and administered in accordance therewith.

14. *Issuance of Bonds for Renewals, Etc., and for Refunding.*

In addition to the issuance of Bonds to pay the Costs of Acquisition and Construction as provided in Section 3 of this Agreement, MMWEC may issue Bonds in accordance with the provisions of the Bond Resolution at any time and from time to time in the event funds are required to pay the costs of (i) renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project necessary to achieve design capability, or required by any governmental agency or authority, (ii) renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project which in the opinion of the Consulting Engineer appointed and retained by MMWEC under the Bond Resolution are necessary or desirable to improve operating reliability or to reduce until power costs, and any acquisition of fuel for the Project, and any decommissioning or termination of the Project, and (iii) renewals, extraordinary repairs, replacements, modifications, additions and betterments for the Project for which MMWEC shall be responsible under any ownership agreement relating to any jointly owned Facility, all to the extent that MMWEC is not reimbursed for payment of the costs set forth in clauses (i) through (iii) from the proceeds of insurance. The Annual Budget delivered to the Participant for the Contract Year in which such Bonds are issued, or an amended Annual Budget for such Contract Year, shall also set forth the financing plan and budget of expenditures with respect to such Bonds and the proceeds thereof.

Bonds may also be issued to refund any Bonds in order to reduce the Monthly Power Costs or in the event, in the opinion of MMWEC, it may otherwise be advantageous.

15. *Modification and Uniformity of Agreements.*

(a) This Agreement shall not be subject to termination by any party under any circumstances, whether based upon the default of any other party under this Agreement, or any other instrument, or otherwise, except as specifically provided in this Agreement.

(b) This Agreement shall not be amended, modified, or otherwise changed by agreement of the parties in any manner that will materially and adversely affect the security afforded by the provisions of this Agreement for the payment of the principal of and premium, if any, and interest on any of the Bonds, and any other obgligations of MMWEC ranking pari passu therewith as to the security afforded by the provisions of this Agreement, as they respectively become payable, so long as any of the Bonds and such obligations are outstanding and unpaid or funds are not set aside for the payment or retirement thereof in accordance with the Bond Resolution.

(c) If any other Power Sales Agreement is amended or replaced so that it contains terms and conditions different from those contained in this Agreement. MMWEC shall notify the Participant and upon timely request by the Participant shall amend this Agreement to include similar terms and conditions.

16. *Notices.*

Any notice, demand, approval, proposal, protest, direction or request provided for in this Agreement to be delivered, given or made to the Participant shall be deemed delivered, given or made if delivered in writing

in person or mailed by registered or certified mail, postage prepaid, return receipt requested, addressed to the person and at the address designated in writing filed with MMWEC by the Participant. The Participant may change such designation, at any time and from time to time, by giving notice to MMWEC as below provided. Any such notice, demand or request to be delivered, given or made to MMWEC shall be deemed delivered, given or made if delivered in writing, in person, or sent by mail as above provided to the following address:

General Manager
Massachusetts Municipal Wholesale Electric Company
Stony Brook Energy Center
Westover Industrial Airpark
P.O. Box 426
Ludlow, Massachusetts 01056

or such other address designated as provided above.

17. *Relationship to Other Instruments.*

It is recognized by the parties hereto that MMWEC in the ownership, construction, acquisition and operation of the Project must comply with the requirements of any ownership agreements relating thereto, the Bond Resolution and all licenses, permits and regulatory approvals necessary for such ownership, construction, acquisition and operation, and it is therefore agreed that this Agreement is made subject to the terms and provisions of said ownership agreements, the Bond Resolution and all such licenses, permits and regulatory approvals.

18. *Arbitration.*

Any dispute under this Agreement shall be submitted to arbitration at the request of either MMWEC or the Participant. Copies of any such request shall be given to all other Participants and it shall specify the issue or issues in dispute. Within ten days after receipt of such

a request MMWEC and the Participant shall confer and attempt to agree upon appointment of a single arbitrator. If such agreement is not accomplished, MMWEC or the Participant may reqeust the American Arbitration Association to appoint an arbitrator. The arbitrator shall conduct a hearing in Ludlow, Massachusetts, and within thirty days thereafter, unless such time is extended by agreement of MMWEC and the Participant, shall notify the parties of his decision, stating his reasons for such decision and separately listing his findings of fact and conclusions of law. The arbitrator shall not have power to amend or add to this Agreement. Subject to such limitation, the decision of the arbitrator shall be final and binding on MMWEC and the Participant except that either party may petition a court of competent jurisdiction for review of errors of law. The pendency of arbitration shall affect neither the obligation of the Participant to make any payment in full when due under this Agreement nor the obligations of this Agreement upon the failure of the Participant to make any payment in full when due under this Agreement.

19. *Applicable Law.*

This Agreement is made under and shall be governed by the law of the Commonwealth of Massachusetts.

20. *Severability.*

If any section, paragraph, clause or provision of this Agreement shall be finally adjudicated by a court of competent jurisdiction to be invalid, the remainder of this Agreement shall be unaffected by such adjudication and all of the remaining provisions of this Agreement shall remain in full force and effect as though such section, paragraph, clause or provision or any part thereof so adjudicated to be invalid had not been included herein.

21. *Assignment of Agreement.*

This Agreement shall inure to the benefit of, and shall be binding upon, the respective successors and assigns of the parties to this Agreement; *provided*, that neither this Agreement, nor any interest herein (including Project Capability), shall be assigned or transferred or sold by the Participant, except as provided herein, without the written consent of MMWEC, nor if in the opinion of counsel to MMWEC such assignment or transfer or sale would adversely affect the exemption from Federal Income Taxation of the interest on the Bonds. No such assignment or transfer or sale shall relieve the Participant of any obligation hereunder.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the 27th day of September, 1979.

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY

By /s/ Phillip L. Otness
Title: General Manager

Participant's Name

By

Title:

EXHIBIT A

PARTICIPANTS AND PARTICIPANTS' SHARES (1)

PROJECT NO. 6

Participant	Approximate Share of Project Capability (KW)	% Share of Project Capability
Town of Ashburnham	737	0.4238
Town of Boylston	833	0.4790
Town of Danvers	14,071	8.0909
Town of Georgetown	1,115	0.6411
Town of Groton	1,711	0.9838
Town of Hingham	5,658	3.2534
Town of Holden	5,000	2.8750
City of Holyoke	3,312	1.9044
Town of Hudson	26,000	14.9502
Town of Hull	1,992	1.1454
Town of Mansfield	9,548	5.4902
Town of Middleborough	2,541	1.4611
Town of Middleton	4,630	2.6623
Town of North Attleborough	3,056	1.7572
Town of Paxton	937	0.5388
City of Peabody	18,340	10.5456
Town of Reading	25,400	14.6052
Town of Shrewsbury	6,160	3.5420
Town of Sterling	1,100	0.6325
Town of Templeton	2,327	1.3380
Town of Wakefield	3,812	2.1919
Town of West Boylston	849	0.4882
Subtotal for MMWEC Members	139,129	80.0000
Village of Ludlow, Vermont (2)	1,382	0.7947
Village of Lyndonville, Vermont (2)	1,500	0.8625
Village of Morrisville, Vermont (2)	1,800	1.0350
Village Northfield, Vermont (2)	500	0.2875
Village of Stowe, Vermont (2)	3,500	2.0125
Village of Swanton, Vermont (2)	2,264	1.3018
Washington Electric Co-operative, Inc. (2) (3)	2,700	1.5525
Vermont Electric Cooperative, Inc. (2) (3)	10,000	5.7501
Pascoag Fire District, Rhode Island (4)	2,000	1.1500
Eastern Maine Electric Cooperative, Inc. (3)	5,000	2.8751
New Hampshire Electric Cooperative, Inc. (3)	4,136	2.3783
Subtotal for MMWEC Non-Members	34,782	20.0000
TOTAL	173,911	100.0000

(1) If (i) the Towns of North Attleborough and Reading, Massachusetts, the City of Holyoke, Massachusetts, and New Hampshire Electric Cooperative, Inc., or any of them, do not execute this Agreement by October 12, 1979, or if the respective vote or resolution authorizing such execution authorizes the purchase of a share of Project Capability less than the respective approximate share of Project Capability (KW) specified above, or (ii) this Agreement, as to any Participant, is subject to approval or disapproval by or lapse of a particular period of time after filing with the State of Vermont Public Service Board or the State of Rhode Island Public Utilities Commission, and such Board or Commission, as the case may be, has not approved or disapproved this Agreement, or the particular period of time has not elapsed, as the case may be, by December 21, 1979, or such later date as shall be agreed to by MMWEC (but not later than December 31, 1979), or (iii) any Participant is a party to an agreement or other instrument pursuant to which approval of this Agreement by the Administrator of the Rural Electrification Administration is required and such Administrator or his delegate has not approved this Agreement by November 1, 1979, or such later date as shall be agreed to by MMWEC (but not later than December 31, 1979), or (iv) the percentage ownership interest of MMWEC in Seabrook Units Nos. 1 and 2 is decreased pursuant to Exhibit B, then and in each such case each Participant's percentage share of Project Capability specified above shall be changed to equal the proportion which its approximate share of Project Capability (KW) specified above bears to the total of all remaining Participants' approximate share of Project Capability (KW) specified above; *provided, however,* that to the extent any such change results in the total percentage shares of Project Capability for MMWEC Members being equal to less than 80% of the total percentage shares of Project Capability for all Participants, then the percentage shares of Project Capability of all MMWEC Non-members shall be reduced pro-rata. Anything in this Agreement to the contrary notwithstanding, in the event of any such failure by the Administrator of the Rural Electrification Administration or his delegate, the State of Vermont Public Service Board, or the State of Rhode Island Public Utilities Commission to approve or disapprove this Agreement, or any such failure of a particular period of time to elapse after filing with such Board or Commission, as the case may be, the applicable Participant shall thereupon no longer be or be deemed to be or to have been a Participant for any and all purposes hereof. MMWEC shall notify the Participants promptly, in writing, of any change in the Participants or their shares of Project Capability pursuant to the foregoing provisions, and each such notification shall be a part of this Agreement.

[Continued]

[Continued]

(2) Approval or disapproval by or lapse of a particular period of time after filing with the State of Vermont Public Service Board is required.

(3) Approval of the Administrator of the Rural Electrification Administration is required.

(4) Approval or disapproval by or lapse of a particular period of time after filing with the State of Rhode Island Public Utilities Commission is required.

EXHIBIT B

PROJECT DESCRIPTION
PROJECT NO. 6

1. Project No. 6 is to consist of ownership interests of up to 7.56135% (or such lesser portion as MMWEC, prior to December 31, 1980, may notify the Participants is available) in each of the proposed nuclear generating units known as Seabrook Unit No. 1 and Seabrook Unit No. 2. Public Service Company of New Hampshire is constructing the Seabrook plant on a site in Seabrook, New Hampshire. Each of Seabrook Units Nos. 1 and 2 is a nuclear generating unit of approximately 1,150,000 KW net capability. Such units, each a Facility, are tentatively scheduled to commence commercial operation in April 1983 and February 1985, respectively.

2. The costs described in Section 1(f)(10) of this Agreement relate to study and development activity for implementing sources of renewable energy. Such activity's funding shall not exceed $5,000,000 derived from the proceeds of Bonds issued to finance the Costs of Acquisition and Construction of the Project to be utilized for preliminary survey, feasibility, investigation and development costs, engineering and licensing activities, acquisition of interests in land or property, related administrative and other costs, and such other purposes as may be voted by the Board of Directors of MMWEC, leading to a future MMWEC construction project. Renewable energy sources shall include, but not be limited to, hydroelectric development and refuse fueled generating processes. The selection of projects under this paragraph shall be under the direct control of the MMWEC Board of Directors.

EXHIBIT C

METERING AND DELIVERY POINT
PROJECT NO. 6

The Participant's Share of Project Capability will be metered and delivered at the low side of the station transformer at the unit site.

IN THE SUPREME COURT
OF THE STATE OF VERMONT

Supreme Court Docket No. 86-555

VERMONT DEPARTMENT OF PUBLIC SERVICE, VILLAGE OF STOWE; and VERMONT ELECTRIC COOPERATIVE, INC.,
Plaintiffs-Appellants,

v.

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY; VILLAGE OF LUDLOW; VILLAGE OF LYNDONVILLE; VILLAGE OF MORRISVILLE; and VILLAGE OF NORTHFIELD,
Defendants-Appellees.

MEMORANDUM IN SUPPORT OF MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY'S MOTION FOR REARGUMENT

Massachusetts Municipal Wholesale Electric Company ("MMWEC") moves pursuant to V.R.A.P. 40 for reargument of the Court's decision entered September 27, 1988. The Court overlooked or misapprehended a number of points of law which, if properly considered, would require a reversal of the Court's decision. The most glaring, although by no means the only, oversight in the Court's decision is its inexplicable failure to uphold Lyndonville's PSA even after citing the statute that explicitly authorizes Lyndonville to enter into take-or-pay contracts. As discussed in detail below, the authority of Lyndonville is one of a number of issues raised by the Court's decision that must be addressed on reargument.

* * * *

E. *The Court's Decision Violates The Commerce Clause, The Takings Clause And The Due Process Clause of the United States Constitution.*

If permitted to stand, the Court's sudden and unpredictable change in state law invalidating the PSAs between all Vermont participants and MMWEC will result in violations of the Commerce Clause, Takings Clause and the Due Process Clause of the United States Constitution. U.S. Const. Art. I, § 8; amend. V. cl. 4 and amend. XIV, § 1, cl. 3.[1]

Under the commerce clause "states are barred from regulating interstate commerce in a manner which significantly interferes with the national economy." *Hyde Park Partners, L.P.* v. *Connolly*, 839 F.2d 837, 843 (1st Cir. 1988) and cases cited. Using the commerce clause the United States Supreme Court has "consistently rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce . . . ." *H.P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 535 (1949).

In the instant case, the decision of the Court dramatically interferes with the movement of a critical article of interstate commerce in modern society—electricity. It effectively prohibits Vermont participants from entering into any future wholesale power contracts with out-of-state participants. It also provides a basis for Vermont municipalities and cooperates to invalidate pre-existing energy contracts with out of state utilities, which the Vermont participants now find uneconomical or otherwise undesirable. The effect of the Court's ruling is to create a special set of limitations on interstate power agreements which apply only to Vermont utilities. Such a re-

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[1] MMWEC pleaded by affirmative defense various federal constitutional defenses to plaintiffs' claims in this case. In light of this Court's decision on state law issues, at a minimum MMWEC is entitled to have the case remanded to the Superior Court for consideration of the constitutional issues.

sult impermissibly delays and inconveniences interstate Commerce. *See, e.g., Kassel* v. *Consolidated Freightways Corp.* 450 U.S. 662 (1981).

The Takings Clause is made applicable to the states through the Due Process Clause. See *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 122 (1977). A key consideration in determining whether a state has impermissibly "taken" property is "[t]he economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. . . ." *Id.* at 124.

Here MMWEC issued hundreds of millions of dollars in bonds and invested this money in the Seabrook project based on written promises by municipal and cooperative utilities that they had an unconditional obligation to make monthly payments to MMWEC. The Court's decision, by making a sudden change in Vermont law that was unpredictable in terms of the relevant precedents, ignored MMWEC's reasonable reliance on the PSAs, thus resulting in the frustration of reasonable "investment-backed expectations" which cannot be taken without compensation. See *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179 (1979).

Respectfully submitted,

/s/ Jeffrey F. Jones

/s/ William Lahey
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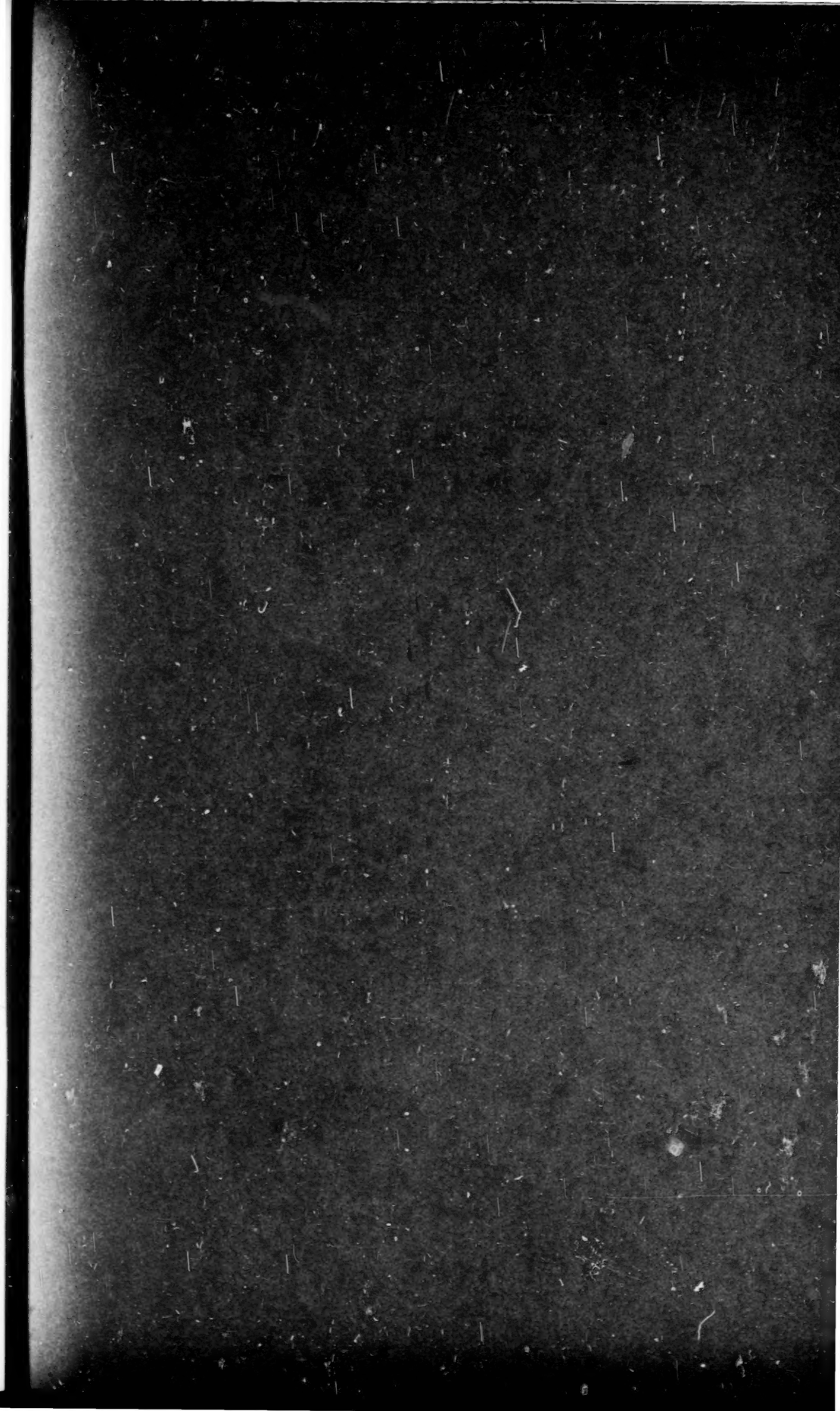
/s/ John Parker
JOHN PARKER
PARKER, LAMB & ANKUDA, P.C.
P.O. Box 519
Springfield, Vermont

Dated: October 10, 1988



MOTION FILED
JUL 10 1989

No. 88-1769

In the Supreme Court of the United States

OCTOBER TERM, 1989

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY, PETITIONER

v.

VERMONT DEPARTMENT OF PUBLIC SERVICE, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

MOTION FOR LEAVE TO FILE BRIEF FOR CONTINENTAL BANK N.A., BOND FUND TRUSTEE, AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1989

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MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY, PETITIONER

v.

VERMONT DEPARTMENT OF PUBLIC SERVICE, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

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MOTION FOR LEAVE TO FILE BRIEF FOR CONTINENTAL BANK N.A., BOND FUND TRUSTEE, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 36 of the Rules of this Court, Continental Bank N.A., as Bond Fund Trustee for the holders of bonds issued by Massachusetts Municipal Wholesale Electric Company ("MMWEC"), requests leave to file the accompanying brief as *amicus curiae* in support of petitioner. Counsel for petitioner has consented to the filing of this brief, but counsel for respondents have refused consent.

Continental Bank is the Bond Fund Trustee of almost $1.5 billion in MMWEC revenue bonds, approximately $517 million of which were issued to finance the construction of a nuclear power plant at Seabrook, New Hampshire. The applicable General Bond Resolution authorizes the Bond Fund Trustee to take steps it deems appropriate for the protection and enforcement of the rights of the bondholders.

The primary sources for repayment of the bonds are the revenues from municipalities and utilities in Vermont, Massachusetts, Maine, and Rhode Island that, under power sales agreements, agreed to defray the cost of construction of the power plant. The judgment of the Supreme Court of Vermont jeopardizes those sources of repayment in two respects. First, that judgment purports to relieve the Vermont participants of their obligation to make payments under their power sales agreements, thereby potentially reducing the sources for repayment by approximately 20%. Second, certain Massachusetts utilities and municipalities have asserted, based upon the judgment below, that they also are excused from making payments under their power sales agreements.

The Bond Fund Trustee submits this brief as *amicus curiae* in light of the potential threat to the repayment of the revenue bonds at issue in this case as well as to the stability of the bond market for similar publicly financed projects around the United States.

For the foregoing reasons, the motion of Continental Bank for leave to file the accompanying brief as *amicus curiae* in support of petitioner should be granted.

Respectfully submitted.

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JULY 1989

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1769

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BRIEF FOR CONTINENTAL BANK N.A., BOND FUND TRUSTEE, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

Continental Bank N.A. is the Bond Fund Trustee of approximately $517 million in revenue bonds whose primary source of repayment is the revenue received under the power sales agreements at issue in this case. As described more fully in the accompanying motion for leave to file this *amicus* brief, the decision of the Vermont Supreme Court potentially threatens the interests of the bondholders.

ARGUMENT

THE VERMONT SUPREME COURT'S FAILURE TO ALLOW CONSIDERATION OF PETITIONER'S FEDERAL CONSTITUTIONAL DEFENSES SHOULD NOT BE PERMITTED TO STAND

This case concerns respondents' attempt to abrogate long-term contracts with petitioner for the financing of public power projects. Among other defenses, petitioner contended that the invalidation of the contracts would violate the federal Constitution. The Vermont Supreme Court held that the contracts were void as a matter of state law and entered final judgment against petitioner *even though no court had passed upon petitioner's federal defenses.* The failure of the court below to allow consideration of petitioner's federal claims violates the Constitution and warrants relief from this Court.

A. The Vermont Supreme Court Committed Constitutional Error In Failing To Allow Consideration Of Petitioner's Federal Defenses

1. This case involves "take-or-pay" contracts between petitioner and several municipalities and utilities in Vermont, Massachusetts, Maine, and Rhode Island. These so-called "power sales agreements" ("PSAs") provide for the sale by petitioner of shares of "project capability" (as defined in the PSAs, see Pet. 5) in electrical generating plants. Petitioner uses the revenues received under the PSAs to pay the principal and interest on bonds it issued to finance its power supply system. As petitioner stated in its brief in the Vermont Supreme Court (at 14), "[t]he take-or-pay provisions are necessary in order to permit [petitioner] to sell its bonds to investors," since "[i]t is by virtue of the take-or-pay provisions of the [PSAs] that the participants under-

take their proportionate share of the financing and construction risk" for the project.

Some six years after the PSAs were executed, respondents brought this suit to challenge the validity of the PSAs. Petitioner defended on the ground that the contracts were valid as a matter of Vermont law. Petitioner also contended that, if the contracts were invalidated under state law, that result would violate the federal Constitution.

In the Vermont trial court, the parties filed cross-motions for summary judgment limited to respondents' theory that the PSAs were *ultra vires* under state law. The trial court agreed with petitioner that the contracts were authorized by state law and dismissed respondents' complaint on that ground. Accordingly, it was unnecessary for the parties to brief, or the court to reach, petitioner's federal constitutional contentions.

On respondents' appeal, the Vermont Supreme Court reversed the trial court's state-law ruling. However, without either considering petitioner's federal defenses itself or remanding to the trial court to do so, the Vermont Supreme Court ordered that "judgment for [respondents] is entered" (Pet. App. 1a, 24a). Thus, under the decision below, the Vermont Supreme Court nullified the PSAs—thereby purportedly relieving the Vermont participants of their contractual obligations and imposing the entire undertaking on parties in other states—without ever passing upon petitioner's contention that such an interpretation of state law would violate the federal Constitution. In this way, the court simply ignored the constitutional provisions upon which peti-

tioner relied that are designed to prohibit state interference with vested property rights and to guard against local parochialism that favors in-state over out-of-state interests.

2. The Vermont Supreme Court offered no reason whatsoever for failing to allow consideration of petitioner's federal claims in any state court. The court's unexplained and inexplicable action in entering final judgment against petitioner without adjudicating its federal defenses is constitutionally impermissible.

To begin with, as the petition demonstrates (at 12-14), the Vermont Supreme Court's foreclosure of petitioner's federal claims violates procedural due process. The Due Process Clause, of course, "protect[s] * * * defendants [seeking] to protect their property" and prohibits a court from resolving a lawsuit " 'without affording a party the opportunity for a hearing on the merits.' " *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). This Court's "decisions have emphasized time and again * * * [t]hat the Due Process Clause grants * * * [a] party the opportunity to present his case and have its merits fairly judged" (*id.* at 433). To deprive petitioner of its property interest in the PSAs without considering its federal defenses is flatly inconsistent with the most rudimentary principles of due process. See also P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 604-605 (3d ed. 1988).

What is more, under the Supremacy Clause of the Constitution, state courts are not free to ignore rights protected by federal law or to refuse to entertain federal defenses. See, *e.g.*, *Testa* v. *Katt*, 330

U.S. 386 (1947); *FERC* v. *Mississippi*, 456 U.S. 742, 760-761 (1982). State courts are " 'bound to guard and protect rights secured by the Constitution' " (*Duckworth* v. *Serrano*, 454 U.S. 1, 3-4 (1981)), and "it is the duty of the [state] courts to adjudicate [federal claims]." *Jackson* v. *Lykes Steamship Co.*, 386 U.S. 731, 735 (1967). Because "constitutional rights [may be] denied as well by the refusal of the state court to decide the question * * * as by an erroneous decision of it" (*Lawrence* v. *State Tax Comm'n*, 286 U.S. 276, 282 (1932)), the judgment of the Vermont Supreme Court impermissibly frustrates the vindication of federal constitutional rights.

The Vermont Supreme Court gave no excuse—and had none—for failing to allow consideration of petitioner's federal constitutional claims. It is beyond question that petitioner properly raised its federal defenses below. To be sure, the trial court proceedings initially focused solely on the state-law issues and deferred the affirmative federal defenses to a later stage should their resolution prove necessary. Accordingly, petitioner advised the Vermont Supreme Court that "[i]f this Court does not affirm the judgment [of the trial court on the state-law grounds], the case should be remanded for determination by the trial court of the issues not previously addressed." Petitioner's Vt. S. Ct. Br. 21. And when the Vermont Supreme Court's decision pretermitted any consideration of the federal issues, petitioner promptly filed a motion for reargument pointing out the error, which the court simply denied without comment. See Pet. App. 27a (contending in the motion for reargument that "[i]nvalidating the PSAs on the basis of Vermont law impermissibly burdens interstate commerce and violates the Takings Clause and the Due Process Clause of the United States Constitution").

In the procedural posture of the case below, and in the face of petitioner's brief and motion for reargument, the Vermont Supreme Court's failure to allow consideration of petitioner's federal constitutional defenses was plainly erroneous. The Vermont Supreme Court entered final judgment in this case despite the fact that *no* court had *ever* reviewed petitioner's federal claims. And in thus precluding litigation of those issues, the Vermont Supreme Court was utterly silent and did not give *any* reason to justify its result. This Court should not tolerate such a manifestly unfair and entirely unexplained outcome.

3. The Vermont Supreme Court's failure to allow adjudication of petitioner's federal claims is particularly unwarranted and inequitable here, because those claims raise a substantial legal question: whether the federal Constitution protects against a state court's abrogation of long-term contracts used to finance bonds for power generating systems. Legal stability and predictability are essential to the viability of the bond market and the property rights of bondholders, as this Court previously has recognized. See, *e.g.*, *Phoenix* v. *Kolodziejski*, 399 U.S. 204, 214 (1970) (retroactive application of a decision invalidating municipal bonds "would be unjustifiably disruptive"); *Cipriano* v. *Houma*, 395 U.S. 701, 706 (1969) ("[s]ignificant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect").[1] As petitioner discusses

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[1] See also *Hill* v. *Stone*, 421 U.S. 289, 301 (1975); *Lemon* v. *Kurtzman*, 411 U.S. 192, 203 (1973); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 108 (1971); *Chicot County Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940).

(Pet. 14-20), there are substantial arguments that the nullification of the PSAs violates the federal Constitution. Nevertheless, the Vermont Supreme Court has allowed respondents to walk away from their commitments without so much as a mention of the constitutional questions presented.

Furthermore, these constitutional issues are of considerable public importance. "[C]ontracts containing take-or-pay provisions are common for the electric industry generally and in Vermont in particular" (Pet. 8). Thus,

> the contracts challenged here are substantially the same as, and in some instances virtually identical to, numerous other contracts under which a great many municipal and cooperative utilities both in Vermont and across the nation obtain power * * *.
>
> * * * * *
>
> "[Such] contracts are the norm, not the exception in joint generating ventures * * *."

Petitioner's Vt. S. Ct. Br. 1-2, 14 n.13 (quoting findings of the Vermont Public Service Board). Take-or-pay contracts "are a principal means by which many New England utilities meet their capacity requirements on a long-term basis" (Pet. 6), and at least three other projects involving Vermont participants have comparable take-or-pay provisions (see petitioner's Vt. S. Ct. Br. 15).

In light of the clear error and blatant unfairness of the Vermont Supreme Court's decision, and in light of the significance of the federal issues involved, the judgment below should not be permitted to stand.

B. This Court May Wish To Summarily Vacate The Judgment Below And Remand The Case To The State Courts For Consideration Of Petitioner's Federal Constitutional Defenses

In our view, further briefing and argument are unnecessary to demonstrate the palpable error that infects the Vermont Supreme Court's judgment. Accordingly, as an alternative to plenary review, this Court may wish to consider summarily vacating the judgment of the Vermont Supreme Court and remanding the case to the state courts to pass upon petitioner's federal constitutional defenses. A remand would remedy the harsh and indefensible result reached below and, at the same time, would afford the state courts the opportunity to address those federal issues in the first instance. See 28 U.S.C. § 2106 ("[t]he Supreme Court * * * may * * * modify, vacate, set aside or reverse any judgment * * * brought before it for review, and may remand the cause and direct the entry of such appropriate judgment * * * or require such further proceedings to be had as may be just under the circumstances").

Rule 23.1 of the Rules of this Court specifically provides that the Court may act on a petition for certiorari by entering "a summary disposition on the merits." Such summary disposition is appropriate "[i]f the Supreme Court considers the decision below to be clearly wrong but not worthy of oral argument." R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 286 (6th ed. 1986). Summary action is warranted here to wipe the slate clean of the final judgment below and allow the state courts to decide petitioner's constitutional claims on the merits. See, *e.g.*, *Dennison Mfg. Co.* v. *Panduit Corp.*, 475 U.S. 809 (1986) (per curiam) (summarily vacating the

judgment below and remanding the case to the court of appeals to consider an issue that it had originally failed to address).

A remand to the state courts would not prejudice any legitimate interest of respondents. Rather, they simply would have to litigate the federal defenses that petitioner raised as early as its answer to the complaint. There is certainly nothing unfair in requiring that the merits of these federal issues be resolved before respondents can seek a final judgment in their favor.

CONCLUSION

The failure of the Vermont Supreme Court to consider petitioner's substantial federal defenses before entering final judgment was entirely unjustified and represents a serious injustice that frustrates petitioner's constitutional rights. Moreover, the federal issues involved have important consequences not only for the power project in this case but for a number of other projects in New England and around the country. In these circumstances, the Court should grant the petition and, at a minimum, remand the case to enable the state courts to consider petitioner's federal claims.

Respectfully submitted.

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MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,

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BRIEF OF VERMONT ELECTRIC COOPERATIVE, INC. IN OPPOSITION TO THE PETITION OF MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY

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Questions Presented.

Petitioner, Massachusetts Municipal Wholesale Electric Company (alternatively, "Petitioner" or "MMWEC") asserted several affirmative defenses in its initial pleadings including defenses based upon the Constitution. Petitioner failed to brief or otherwise refer to those constitutional defenses either before the trial court on a motion for summary judgment or before the Vermont Supreme Court on appeal. Petitioner did raise those defenses on a motion to reargue, which the Vermont Supreme Court denied.
The questions presented are:

(1) Whether the Court lacks jurisdiction to consider Petitioner's federal constitutional defenses because the decision below rests on the adequate and independent state ground that, pursuant to Vermont's rules of appellate procedure, Petitioner waived those defenses by failing to raise them at either the trial or appellate stage of this litigation;

(2) Whether the decision of the Vermont Supreme Court violates the takings clause where that decision adjudicated the contract rights of several private parties, did not involve seizure of property by the state, and was neither an unpredictable change in Vermont precedent nor an example of state parochialism; and,

(3) Whether the facially neutral decision of the Vermont Supreme Court violates the commerce clause where that decision merely sets forth rules of municipal and corporate governance, where there is no proof of discriminatory intent or discriminatory impact, no risk of inconsistent regulations among the states, and any incidental impact on interstate commerce is outweighed by the state's interest in prescribing the powers of its municipalities and corporations.

Affiliated Corporations.

Vermont Electric Cooperative, Inc. ("VEC") (Plaintiff below and Respondent herein) is the principal member of the Vermont Electric Generation and Transmission Cooperative, Inc.

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No. 88-1769

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BRIEF OF VERMONT ELECTRIC COOPERATIVE, INC. IN OPPOSITION TO THE PETITION OF MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY

Respondent, Vermont Electric Cooperative, Inc., respectfully prays that the Court refuse to issue a Writ of Certiorari to review the judgment of the Supreme Court of Vermont entered on September 27, 1988, and made final by denial of a motion for reargument entered on January 30, 1989.

Jurisdiction.

As explained in more detail below, the Court lacks jurisdiction of this case because Petitioner's constitutional claims were not "specially set up or claimed. . ." within the meaning of 28 U.S.C. § 1257(a).[1] Instead, Petitioner's failure to assert its constitutional defenses on appeal before the Vermont Supreme Court constituted a waiver of those defenses. Consequently, the Vermont Supreme Court's refusal to hear reargument rests on adequate and independent state grounds. Thus, the Court lacks jurisdiction of this case.

Statement of the Case.

1. *INTRODUCTION.*

After MMWEC filed its answer in the action below, it appears to have made a strategic decision not to assert most of the numerous defenses which it had raised in that answer. Among others, MMWEC failed to press its tenth and twelfth defenses which purported to invoke the United States Constitution.[2] Instead, MMWEC chose to focus its case on what it refers to as "potentially dispositive grounds of state law" regarding the validity and enforceability of certain power sales contracts referred to in the Petition and herein as the "PSA's". Petition at 12.

Throughout the proceedings, MMWEC made not a

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[1]Petitioner erroneously cites to "28 U.S.C. § 1257(3)." Petition at 2. On June 27, 1988, however, § 1257 was amended to eliminate § 1257(1), (2) and (3) and replace it with § 1257(a) and (b). Supreme Court Case Selections Act, Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988). We assume Petitioner intends to rely on 28 U.S.C. § 1257(a) for jurisdiction.

[2]Petitioner's decision not to assert the defenses may have resulted from a change in counsel. Shortly after MMWEC's original counsel filed its answer asserting constitutional defenses, another law firm entered an appearance on behalf of MMWEC and assumed responsibility for the case. That firm retained responsibility through MMWEC's defeat in the Vermont Supreme Court. In its Petition for Certiorari, MMWEC has returned to its original counsel to resurrect certain of the constitutional defenses included in its original answer but abandoned for the rest of the proceedings below.

whisper about constitutional defenses. Indeed, after it won its case at the trial level, MMWEC clearly indicated, in its brief on appeal to the Vermont Supreme Court, that it had abandoned any reliance on federal constitutional defenses. It abandoned those claims with the knowledge that issues not briefed on appeal to the Vermont Supreme Court "must be deemed waived." Joint Brief of the Defendant Appellees on appeal to the Vermont Supreme Court at 20 (certain pages of which are attached as an Appendix, referred to hereafter as "VEC Appendix"). VEC Appendix at 3a. Only after Petitioner lost on dispositive state grounds in the Vermont Supreme Court did it seek on Motion for Reargument to resurrect certain of the constitutional issues it had repeatedly failed to raise throughout the entire course of the litigation below.

Petitioner couples this eleventh hour change in strategy with an unsubstantiated blast at the integrity of the Vermont Supreme Court. It now claims that the decision — written by that court's Chief Justice for a unanimous court — was a "wholesale desertion of legal and equitable responsibility for partisan benefit . . ." Petition at 16. Because MMWEC disagrees with the result — and for no other articulated reason — it contends that the Vermont judicial system acted with an unspoken bias in favor of "hometown contractual participants." This, of course, flies in the face of the fact — acknowledged by MMWEC in the Petition — that a substantial "majority of the Vermont participants themselves" vigorously maintained that the PSA's were valid and enforceable. Petition at 16; *See id.* at iii.

Indeed, MMWEC, along with five of the six original Vermont signatories to the PSA's, as well as the Vermont League of Cities and Towns as an *amicus curiae,* bombarded the Vermont courts with dire warnings that if the PSA's were voided: (1) current and future supplies of power for Vermont would be jeopardized; (2) the ability of Vermont's municipalities to issue bonds would be threatened; and, (3) everyone involved in the contracts would be plunged into a morass of securities fraud litigation. The Vermont Supreme Court explicitly rejected such arguments — as it

rejected arguments associated with the financial burden of the PSA's — in favor of a ruling based upon traditional and well understood principals of municipal and corporate governance.

Petitioner's cavalier aspersions regarding the motives of the Vermont Supreme Court is matched only by its superficial analysis of the decision itself. A fair reading of that decision leaves no doubt of the quality of that court's analysis. That court carefully considered the nature of the contracts involved and the legal ramifications of the massive delegation of authority and management responsibility envisioned by those contracts. As that court observed, the PSA's purported to delegate to MMWEC unlimited spending authority on behalf of the Vermont signatories to the PSA's. Given the absence of any legislative authority for such a delegation, fundamental notions regarding nondelegation of power of the municipal signatories and management authority of the cooperative signatories, virtually demanded a holding that the PSA's were *ultra vires* and void *ab initio*.

2. *MMWEC AND ITS CONTRACTS*

As indicated in the Petition, MMWEC is a joint action agency organized to meet the electric requirements of its member municipalities. Membership in the organization is limited to municipalities located in Massachusetts which — together with the governor of Massachusetts — chose its Board of Directors.

As a regulated joint action agency, MMWEC is empowered by the Massachusetts legislature to enter into power supply contracts with provisions which would not have been permissible under traditional notions of the common law. Thus, MMWEC's enabling legislation specifically provided that its power supply contracts "may contain provisions for . . . delegation and other matters deemed necessary or desirable to carry out its purposes." Mass. Gen. Laws Ann. Ch. 775, § 6(a)(iii) (West 1975). It is important to note, however, that while that legislation may have confered

authority on Massachusetts municipalities to delegate authority to MMWEC, the Massachusetts legislature could not confer such authority on Vermont entities.[3]

MMWEC's power supply contracts do provide for massive amounts of delegation of authority and responsibility to MMWEC. In essence, the PSA's represented an attempt by the several "participants" to acquire "indirect ownership" of proposed electric generation facilities (the "Project"). In return for a share in "project capability," the participants agreed to accept ultimate financial responsibility for the cost of their share of the Project. Full management responsibility over the Project and complete discretion with respect to financing the Project was vested in MMWEC. Complete decision making power over how much to spend on the Project and whether to continue or cancel the Project was delegated to MMWEC. Indeed, title to the Project was held solely in the name of MMWEC; thereby, denying the participants any of the indicia of control normally associated with ownership.

These and similar aspects of the PSA's systematically deprived the participants located in Vermont (the "Vermont Participants") of any opportunity to exercise their management responsibility on behalf of their members and municipal ratepayers. Of course, in Massachusetts there existed explicit legislative authority for the delegation. In Vermont, however, there was no such authority applicable to these contracts. Moreover, for the Vermont Participants this contractual delegation of authority and management responsibility was further exacerbated by: (1) the ineligibility of the Vermont Participants for membership in MMWEC, thus denying them an opportunity to influence the decisions of that entity; and, (2) the fact that financing by MMWEC was not subject to the authority of the Vermont Public Service Board which could have acted on behalf of the Ver-

[3]The Vermont legislature also granted power to delegate authority as "Special Power" to Vermont entities in the limited context of contracts with the Vermont Public Power Supply Authority, a Vermont entity similar in nature to MMWEC. Vt. Stat. Ann. tit. 30, § 5013 (1986 & Supp. 1988).

mont Participants.

Thus, for example, none of MMWEC's bond issuances in support of the Project were ever authorized or even submitted for consideration by the Vermont Participants. Similarly, the myriad of decisions associated with the continuation or cancellation of the Project were made wholly at the discretion of MMWEC. In short, MMWEC was granted full control of every conceivable aspect of the Project while the participants were unconditionally committed to pay whatever obligations MMWEC might chose to incur. These aspects of the PSA's were the focal point of the Vermont Supreme Court's decision.

3. *THE PROCEEDINGS BELOW*

MMWEC's contention that the decision by the Vermont Supreme Court was motivated by a desire to favor in-state parties over out-of-state interests is belied by the line up of the parties in the case. Of the six original Vermont Participants in the PSA's, five Vermont Participants actively argued that the contracts were valid and enforceable. Only VEC, although originally designated as a defendant, consistently maintained that the PSA's impermissibly delegated to MMWEC management responsibility statutorily vested in the VEC Board of Trustees. In addition, the Village of Stowe intervened in the case as an indirect participant in the PSA's. *See,* Brief of Appellee Village of Stowe in Opposition to the Petition of MMWEC at 1.[4]

In response to the Complaint for Declaratory and Injunctive Relief filed by the Vermont Department of Public Service, VEC filed an Answer and Affirmative Claims for Declaratory Relief. In its Affirmative Claims for Declaratory Relief, VEC sought a declaration with respect to: (1) whether VEC had the corporate authority to enter

[4]Shortly prior to the issuance of the decision by the Vermont Supreme Court, the Washington Electric Cooperative filed documents indicating that it had decided to realign its party status before that court from party appellee to party appellant.

into the PSA's; (2) whether the PSA's had required prior approval by the Vermont Public Service Board; and, (3) whether an amendment to the PSA's entitled "Agreement for Additional Participants Share" had required notice to the Vermont Public Service Board pursuant to General Order No. 45.[5]

Although the foregoing issues were fully litigated in the Vermont Courts, MMWEC never interposed an answer to the affirmative claims of VEC; nor did it ever seek to interpose defenses under the United States constitution to VEC's claims. In this regard it should be noted that the constitutional defenses which were raised by MMWEC pertain specifically to "the conduct of the Vermont Department of Public Service by prosecution of the . . . litigation . . ." Petition at 56(a) - 58(a). At no point in the litigation did MMWEC seek to interpose constitutional defenses to the action by the private parties to the litigation. Indeed, at no point until after the decision of the Vermont Supreme Court did MMWEC refer to the constitutional defenses originally directed at the conduct of the Vermont Department of Public Service.

MMWEC's failure to raise or even refer to the existence of defenses under the United States constitution is especially egregious in light of the assertion briefed by the Department of Public Service in its Brief as Appellant before the Vermont Supreme Court at 96-111 that, "This Court must grant complete summary judgment invalidating the Project 6 Agreements because all of the defendants' affirmative defenses fail as a matter of law."

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[5]MMWEC contends in its Petition at 9-10 that the PSA's were "approved" by the Vermont Public Service Board under its General Order No. 45. The passage is misleading and involves a mischaracterization of the actions taken by the Vermont Public Service Board regarding the filings which were made with respect to the PSA's. The Petition also neglects to reflect the fact that MMWEC failed to comply with General Order No. 45 with respect to the "Agreement for Additional Participants Share" referred to in the text. Most importantly, however, MMWEC's assertions regarding General Order No. 45 are irrelevant because it was not necessary for the Vermont courts to reach the contentions of any party pertaining to General Order No. 45.

Although the appeal before the Vermont Supreme Court expressly invited assertion of Petitioner's constitutional defenses, Petitioner studiously avoided raising their existence in its response to the appeal. Indeed, in several portions of its brief on appeal to the Vermont Supreme Court, MMWEC's avoidance of its alleged constitutional defenses broaches upon an affirmative disavowal of their existence. First, MMWEC failed to refer to its constitutional defenses in its statement of "Claims, Affirmative Defenses and Related Case." VEC Appendix at 2a. It also failed to identify its constitutional defenses as a basis for remand or as issues to be addressed if the Vermont Supreme Court failed to affirm the lower court's decision:

> Certain issues that have been briefed by the DPS were not reached by the trial court and need not be reached by this Court if it affirms the judgment below.[19] If this Court does not affirm the judgment, the case should be remanded for determination by the trial court of the issues not previously addressed.
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> * * *
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> [19]These include certain affirmative claims of the DPS as well as the affirmative defenses raised by the defendant villages and WEC [Washington Electric Cooperative].

VEC Appendix at 3a-4a. Similar language is found at page 66 of MMWEC's Brief on Appeal to the Vermont Supreme Court. VEC Appendix 5a.

MMWEC was well familiar with the Vermont rule that issues — even constitutional issues — not briefed before

the Vermont Supreme Court are waived. Thus, it argued in the same brief:

> A number of issues raised below by the DPS and other plaintiffs have not been briefed and therefore must be deemed waived.[18]
>
> * * *
>
> [18]These include various state and federal constitutional claims as well as the contention that the PSA's conflict that 30 V.S.A. §§ 225-227 authorizing the PSB to regulate electric rates.

VEC Appendix at 3a.

4. *THE DECISION OF THE VERMONT SUPREME COURT*

The unanimous decision issued by the Vermont Supreme Court was written by the Honorable Frederic W. Allen, Chief Justice. Also on the panel was the Honorable Albert W. Barney, Chief Justice (Ret.). In reaching its decision, the Vermont Supreme Court acknowledged the attempts of all parties to interject considerations of matters unrelated to the legal issues. Petition at 22a-23a. For example, the Vermont League of Cities and Towns submitted a brief *amicus curiae* asserting — as did the defendants — that invalidation of the contracts would create serious doubts about the borrowing authority of Vermont municipalities. Similarly, the defendants had raised the specter of massive securities fraud lawsuits. The Vermont Supreme Court responded appropriately:

> We are no more influenced by these considerations that [sic] we are by plaintiffs' emphasis on the immensity of the financial burden imposed by the agreements or by the fact that no power has yet been produced — and may never be produced — by the project. Our Courts are courts of law and will deal with the legal ramifications resulting from our holding; policy considerations are for the legislature.

Appendix at 23a.

The decision of the Vermont Supreme Court was firmly rooted in long recognized principals of law pertaining to the extent to which municipalities and cooperatives may delegate to others — such as MMWEC — powers and responsibilities conferred by law upon their duly elected representatives. These are issues particularly with the province of state courts. These were the issues on which MMWEC chose to litigate the case. Having lost on those issues, it seeks yet another forum with other issues. Indeed, as discussed below, even those issues do not merit consideration by this Court.

Reasons for Denying the Writ.

For the following reasons the Court should deny the writ.

I. THE COURT LACKS JURISDICTION TO CONSIDER THE PETITIONER'S CONSTITUTIONAL DEFENSES BECAUSE PETITIONER FAILED TO RAISE AND PRESERVE THOSE DEFENSES BELOW.

The Vermont Supreme Court denied MMWEC's Motion for Reargument, which raised constitutional defenses, because MMWEC failed to raise or brief those defenses at any stage of the litigation subsequent to the initial pleadings. Indeed, as indicated above, it never interposed the defenses to the pleadings filed by VEC. In fact, MMWEC not only failed to refer to those defenses, but actually abandoned them in its brief an appeal to the Vermont Supreme Court. That omission deprived the state court of an opportunity to consider MMWEC's alleged defenses in the context of the other issues before it. Consequently, the court below concluded that MMWEC had waived its constitutional defenses because MMWEC failed to identify issues that it had previously raised but which that court previously overlooked or misapprehended. This Court has held that such a basis for a decision constitutes an adequate and independent state ground. Because the decision below

rests on an adequate and independent state ground, this Court lacks jurisdiction to consider the Petition.

A. *This Court Should Not Exercise Jurisdiction Over the Lower Court's Decision Because it Rests on Adequate and Independent State Grounds*

It is well settled that this Court will not review a state court decision that rests on adequate and independent state grounds. *Johnson v. Mississippi,* 108 S.Ct. 1981, 1987 (1988); *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 129 (1945) (Frankfurter, J.).[6] Instead, the Court's review is limited to the adequacy and independence of the state ground. *See Street v. New York,* 394 U.S. 576, 583-85 (1969)(Harlan, J.); *Radio Station WOW,* 326 U.S. at 129.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

Webb v. Webb, 451 U.S. 493, 496-97 (1981). The record in this case does not meet the *Webb* burden; the federal claim was not adequately presented before the court below. That want of presentation formed the independent state

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[6]Less settled is whether the issue is a jurisdictional or a prudential restriction on the Court's power of review. While some cases indicate that the issue is jurisdictional, *see Exxon Corp. v. Eagerton,* 462 U.S. 181 n.3 (1983); *Webb v. Webb,* 451 U.S. 493, 496 (1981); *Beck v. Alabama,* 447 U.S. 625, 647-48 (1980)(Rehnquist, J., dissenting); *Street v. New York,* 394 U.S. 576, 581-82 (1969); *Bryant v. Zimmerman,* 278 U.S. 63, 66-69 (1928); other cases indicate the issue may be prudential, *see Heath v. Alabama,* 106 S.Ct. 433, 436-37 (1985); *Illinois v. Gates,* 462 U.S. 213, 217-24 (1983)(Rehnquist, J.). The Court need not decide here whether the issue is jurisdictional or prudential. Instead, assuming the issue is prudential, the Court ought to exercise its discretion to deny review. Several factors would support such an exercise of discretion. Foremost, "the rule [demanding preservation of claims] guarantees that a factual record will be available to [the Court] . . ." *Gates,* 462 U.S. at 224. Further, MMWEC has not satisfied the "presumption against review" of claims not "pressed or passed upon in the state court . . ." *Heath,* 106 S.Ct. at 436-37.

ground upon which the court below based its decision.

The Vermont Supreme Court's independent state ground for denying MMWEC's motion to reargue was adequate. The Vermont Supreme Court refused to consider MMWEC's constitutional defenses because MMWEC failed to assert those defenses prior to its motion to reargue, beyond inclusion in the initial pleadings with numerous other defenses. "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here. . ." *Prudential Federal Savings and Loan Ass'n v. Flanigan,* 478 U.S. 1311, 1311 (1986) (quoting *Radio Station WOW,* 326 U.S. at 128).

In *Radio Station WOW,* the petitioner raised federal claims in its initial pleadings, but did not raise those claims again until its motions to dismiss and for rehearing before the Nebraska Supreme Court. *Id.* at 128. This Court affirmed the Nebraska Supreme Court's refusal to hear the federal claims for the first time: "But it is not for us to consider the correctness of the non-federal ground unless it is an obvious subterfuge to evade consideration of a federal issue." *Id.* at 129. *See also Prudential Federal Savings & Loan Ass'n,* 478 U.S. at 1311 ("The court denied the petition for rehearing without comment, consistent with its practice of refusing to consider issues not pressed at each stage of the litigation"); *Bloeth v. New York,* 82 S.Ct. 661, 662 (1962) (Harlan, J.) (Court denied stay of execution pending petition for certiorari because "this Court would be without jurisdiction . . ." where issue was not raised until second motion for reargument). *Radio Station WOW* and its progeny precludes this Court from reviewing the decision below.

Radio Station WOW reveals that, although a state court may not foreclose consideration of properly asserted constitutional claims, a state court may refuse to consider claims not properly asserted. Petitioner fails to squarely address this issue. In fact, MMWEC completely fails to address the precise issue before the Court; none of the cases it cites considers whether a state court litigant, which failed to assert its federal claims until its motion to reargue, properly

asserted those claims below. *See Laurence v. State Tax Comm'n,* 286 U.S. 276 (1932); *Ward v. Love County,* 253 U.S. 17 (1920); *Postal Telegraph Cable Co. v. Newport,* 247 U.S. 464 (1918); and, *Enterprise Irrigation District v. Farmers' Mutual Canal Co.,* 243 U.S. 157 (1917).

Similarly, each of the cases MMWEC cites regarding arbitrary state procedural bars misses the mark. The instant case does not involve: (1) an inconsistently applied standard, *Sullivan v. Little Hunting Park,* 396 U.S. 229, 233-34 (1969); (2) a discretionary state briefing rule actually complied with, *NAACP v. Alabama,* 377 U.S. 288, 297-298 (1964); (3) an issue raised below, but not in accordance with a newly stated rule of briefing, *Wright v. Georgia,* 373 U.S. 284, 288-91 (1963); (4) an "arid ritual of meaningless form," *Staub v. Baxley,* 355 U.S. 313, 320 (1958); (5) waiving federal claims by substituting appearance and adopting predecessor's answer, *Davis v. Wecksler,* 263 U.S. 22, 24 (1923); (6) state procedure not regularly followed, *Barr v. City of Columbia,* 378 U.S. 146, 149 (1964); or, (7) an attempt to correct a failure to certify record below, *Parrot v. City of Tallahassee,* 381 U.S. 129, 129 (1965).

Even MMWEC's sole case regarding waiver is easily distinguished. In *Douglas v. Alabama,* 380 U.S. 415 (1965), defense counsel objected three times to the prosecutor reading a confession before the jury. *Id.* at 421. After the second objection, the prosecutor assured defense counsel that further objection was not necessary. *Id.* at 421-22. The Alabama Court of Appeals refused to consider defense counsel's argument because there was no ruling sought and acted on. *Id.* at 421. This Court held that:

> "an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here. . . No legitimate state interest would have been served by requiring

> repetition of a patently futile objection, already thrice rejected, in a situation in which repeated objection might well affront the court or prejudice the jury beyond repair."

Id. at 422. This is not such a case.

Unlike the defense counsel in *Douglas,* MMWEC had several opportunities to bring its constitutional defenses to the attention of the state courts, but silently allowed those opportunities to pass by. Indeed, as discussed *infra* at 17-18, MMWEC failed to assert its constitutional defenses in its brief on appeal before the Vermont Supreme Court. In that same brief, MMWEC: (1) correctly asserted that a Respondent's failure to raise constitutional issues constituted a waiver of those issues; and, (2) actively sought to preserve issues other than the constitutional defenses it now asserts. Consequently, MMWEC failed to bring its constitutional defenses to the attention of the court below and "enable it to take appropriate corrective action. . . ." *Douglas* at 422.

As explained below, Vermont rules of practice deem MMWEG's silence to be a waiver of its constitutional defenses. Those rules of practice are longstanding, mandatory, regularly and consistently followed, and relatively easy to comply with. Consequently, there is no indication that the Vermont Supreme Court denied MMWEC of due process when it refused to consider constitutional claims waived below.

B. *Petitioner Waived its Constitutional Defenses By Failing to Comply with Vermont's Fair and Reasonable Requirement of Preserving Issues for Appeal*

Petitioner waived its Constitutional defenses by failing to mention them in its brief in opposition to Respondents' appeal before the Vermont Supreme Court. By the stan-

dards of at least half the states,[7] including Vermont, failure to raise issues in appellate briefs constitutes a waiver. In addition, MMWEC's neglect of its constitutional defenses throughout this litigation demonstrates MMWEC's intention to abandon those defenses. Vermont rules do not allow MMWEC to resuscitate those claims in a motion to reargue.

It is no mystery to MMWEC that Vermont's rules of practic require a litigant to preserve claims on appeal by presenting those claims in briefs before the Vermont Supreme Court. *See infra* at 18. Thus, Vermont's high court has repeatedly found that issues not briefed on appeal are waived. *See R. Brown & Sons, Inc. v. International Harvester Corp.*, 142 Vt. 140, 142, 453 A.2d 83, 84 (1982); *In re Smith, Bell & Hauck Real Estate, Inc.*, 132 Vt. 295,

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[7] *See Holsonback v. Holsonback*, 518 So.2d 146, 148 (Ala. Civ. App. 1987); *Rosson v. Boyd*, 727 P.2d 765, 767 n.6 (Alaska 1986); *Burks Motors, Inc. v. International Harvester Co.*, 250 Ark. 641, ____, 466 S.W.2d 943, 947 (Ark. 1971); *In re Keil, 51 Del. 351, ____, 146 A.2d 398, 399 (Del. 1958); Sarmiento v. State of Florida*, 371 So.2d 1047, 1053 (Fla. Dist. Ct. App. 1979); *Deller v. Smith*, 250 Ga. 157, ____, 296 S.E. 2d 49, 53 (Ga. 1982); *Waters v. Double L, Inc., 114 Idaho* 256, ____, 755 P.2d 1294, 1305-06 (Idaho Ct. App. 1988), *modified*, 115 Idaho 705, 769 P.2d 582 (Idaho 1989); *Village of Mundelein v. Taylor*, 130 Ill. App.3d 819, ____, 474 N.E.2d 843, 847 (Ill. App. Ct. 1985); *Daviess-Martin County Rural Telephone Corp. v. Public Service Comm'n*, 132 Ind. App. 610, ____, 175 N.E.2d 439, 440 (Ind. App. 1961); *Herrick v. Wills*, 333 S.W.2d 275, 276 (Ky. 1959); *Bank of New Orleans and Trust Co. v. H.P.B., Jr. Development Co., Inc.*, 427 So.2d 486, 492 (La. Ct. App. 1983); *Samuels v. Illinois Fire Insurance Co.*, 354 S.W.2d 352, 363 (Mo. Ct. App. 1962); *In re Lorring*, 75 Nev. 330, ____, 349 P.2d 156, 157 (Nev. 1960); *Sanchez v. Dale Bellamah Homes of New Mexico, Inc.*, 76 N.M. 526, ____, 417 P.2d 25, 28 (N.M. 1966); *Lowe v. Tarble*, 313 N.C. 460, ____ n.5, 329 S.E.2d 648, 651 n.5 (N.C. 1985); *Alessandro v. Board of Liquor Control*, 105 Ohio App. 521, ____, 153 N.E.2d 174, 174-75 (Ohio Ct. App. 1957); *Brown v. State Election Board*, 369 P.2d 140, 140 (Okla. 1962); *Weyerhaeuser Co., Inc. v. United Pacific Insurance Co.*, 83 Or. App. 556, ____, 732 P.2d 921, 922 (Or. Ct. App. 1987); *AT&T v. Board of Property Assessment*, 10 Pa. Commw. 41, ____, 309 A.2d 193, 195 (Pa. Commw. Ct. 1973), *rev'd on other grounds*, 461 Pa. 716, 337 A.2d 844 (1975); *Brimbau v. Ausdale Equipment Rental Corp.*, 120 R.I. 670, ____, 389 A.2d 1254, 1255 (R.I. 1978); *Liberty Loan Corp. of Darlington v. Mumford*, 283 S.C. 134, ____, 322 S.E.2d 17, 19-20 (S.C. Ct. App. 1984); *Alexander v. Patrick*, 656 S.W.2d 376, 377 (Tenn. Ct. App. 1983); *Langston v. Eagle Publishing Co.*, 719 S.W.2d 612, 625 (Tex. Ct. App. 1986); *Martinson v. North Central Life Insurance Co.*, 65 Wis.2d 268, ____, 225 N.W.2d 604,604 (Wis. 1975); *State Board of Equalization v. Jackson Hole Ski Corp.*, 745 P.2d 58, 60 (Wyo. 1987).

300, 318 A.2d 183, 187 (1974); *Hilder v. St. Peter,* 144 Vt. 150, 165, 478 A.2d 202, 211 (1984). Petitioner's omission was fatal.

Vermont's requirement that all issues be preserved in the appellate briefs has been codified by the rule of appellate procedure that a litigant may not reargue an issue not briefed on appeal:

> The motion [for reargument] shall state with particularity the points of law or fact, *presented in the briefs upon the original argument,* which in the opinion of the moving party the Court has overlooked or misapprehended and which would probably affect the result.

V.R.A.P. Rule 40 (motions for reargument) (*emphasis added*). Consequently, Vermont's high court will not grant a motion to reargue on a ground not presented in the original brief on appeal. *Champlain Valley Exposition, Inc. v. Village of Essex Junction,* 131 Vt. 449, 457, 309 A.2d 25, 30 (1973) (court will not "re-examine an issue already fully decided using a new theory not presented in the briefs upon the original argument."); *Norman v. American Woolen Co.,* 117 Vt. 28, 36, 84 A.2d 125, 130 (1951) ("purpose of a motion for reargument is to point out matters presented in the brief and relied upon in the original argument which is thought were overlooked or misapprehended by the court reviewing the case . . . New questions are not for consideration . . .").

Petitioner's failure to brief its constitutional defenses on appeal before the Vermont Supreme Court was consistent with its neglect of those defenses throughout this litigation. The record reflects that, following the initial pleadings, MMWEC abandoned its constitutional defenses.[8] First,

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[8]Petitioner's waiver at the trial level was not necessarily fatal. Vermont allows an exemption for first time review of constitutional issues on appeal where those issues are "so grave and serious that [they] strike at the heart of the [appellant's] constitutional rights," *In re Maher,* 132 Vt. 560, 562, 326 A.2d 142, 144 (1974), or where the appellant poses an "argument which, if accepted, would result

(footnote continued on next page)

MMWEC failed to preserve its rights with respect to those defenses before the trial court by presenting neither evidence nor legal arguments related to those defenses. Contrast MMWEC's neglect with actions taken by certain defendants designated below as the "Villages and WEC" to preserve their defenses. For example, the Villages and WEC conditionally executed a stipulation of facts which formed the basis of the motions for summary judgment below. They conditioned their execution on the preservation of their right to further litigate their affirmative defenses. Petitioner, on the other hand, joined in that stipulation of facts unconditionally. Second, the Villages and WEC took the added precaution of asserting in their summary judgment brief that they "expect to further develop additional defenses which have not been briefed . . . including constitutional issues." Petitioner took no such precaution.[9]

Finally, and perhaps most telling, in its brief before the Vermont Supreme Court, MMWEC completely abandoned any right it may have had to assert its constitutional defenses. First, MMWEC enumerated for the court below the "remaining claims, which have not been adjudicated . . ." But, MMWEC did not include its constitutional defenses as "remaining claims," implicitly because it no longer sought to assert them. VEC Appendix at 2a. Similarly, MMWEC's constitutional defenses were not among those issues for which MMWEC sought conditional remand: "These include certain affirmative claims of the DPS as well as the affirmative defenses raised by the defendant villages and WEC". VEC Appendix at 4a. *See* VEC Appendix at 5a.

(footnote continued from previous page)
in a finding that [appellant's] constitutional rights had been seriously abridged." *In re Raymond,* 137 Vt. 171, 175, 400 A.2d 1004, 1006 (1979). Application of this exemption, however, is "rare and extraordinary." *Id.* Despite this opportunity, MMWEC failed to argue before the Vermont Supreme Court that a "rare and extraordinary" circumstance allowed first time review of its claims an appeal.

[9]The constitutional issues Villages and WEC sought to preserve were distinct from the defenses MMWEC now asserts.

In the same document, MMWEC correctly argued that issues not briefed "must be deemed waived": "A number of issues raised below by the DPS and other plaintiffs have not been briefed and therefore must be deemed waived.[18]" *Id.* at 3a. Footnote 18 reads as follows: "These include various state and federal constitutional claims as well as the contention that the PSA's conflict with 30 V.S.A. §§ 225-227 authorizing the PSB to regulate electric rates." *Id.* MMWEC was aware of Vermont's preservation rules, chose to apply those rules to other litigants and chose not to preserve its own constitutional defenses. Petitioner thereby effected a waiver of its constitutional defenses.

The record reflects that the Vermont Supreme Court denied MMWEC's motion to reargue its constitutional defenses because MMWEC waived those defenses. Vermont's rules of waiver support such a conclusion. In any event, this Court assumes that, where a state's highest court refuses to hear a claim, the reason is want of proper presentation of that claim. *Exxon Corp. v. Eagerton,* 462 U.S. at 181 n.3. Petitioner has not met its burden to show the contrary. *Id.*

It appears from the foregoing that under Vermont rules of practice MMWEC waived its constitutional defenses. The Vermont Supreme Court denied the motion for reargument on that basis. Further, that independent state ground is quite adequate. The Vermont rules of waiver are longstanding, mandatory, regularly and consistently followed, and relatively easy to comply with. Those rules are followed by at least half of the country's jurisdictions. Despite ample opportunity to assert its constitutional defenses, MMWEC scuttled each chance it had. The court below, following its well settled rules, refused to allow MMWEC to raise those sunk defenses from the deep. Petitioner now would have this Court believe that it lacked an opportunity to brief those defenses. Petitioner cannot have it both ways; it cannot now claim it was denied of that which it consistently rejected.

II. Petitioner's Federal Constitutional Claims Are Not Substantial And Therefore Are Not Worthy Of Consideration By The State Court System Or By This Court.

The facially neutral decision below constituted a violation of neither the takings clause nor the commerce clause. That well reasoned decision was neither a sudden and unpredicatable change in Vermont precedent nor a mere example of state parochialism. Instead, the Vermont Supreme Court merely adjudicated the contract rights of several private parties. Further, the court's legitimate interest, to set forth rules of municipal and corporate governance, far outweighed any incidental impact on interstate commerce. Consequently, MMWEC presents no constitutional claims worthy of the Court's review.

A. *The Decision of the Vermont Supreme Court Voiding the Contracts did not Constitute a Deprivation of Property in Violation of the Due Process Clause of the Fourteenth Amendment*

A decision of a state court that resolves a contractual dispute between private individuals will not result in a taking of property in violation of the Fifth Amendment.[10] *See Chicago, Burlington & Quincy R. Co. v. Chicago,* 166 U.S. 226, 241 (1897) (state court judgment interfering with private property rights for a *public use,* without compensation, is a taking); *Tidal Oil Co. v. Flanagan,* 263 U.S. 444, 450 (1924) ("the mere fact that the state court reversed a former decision to the prejudice of one party does not take away

[10]Petitioner, in its pointheading, couches its takings argument in terms of the Fourteenth Amendment. Petition at 14. Nonetheless, the body of MMWEC's takings argument does not assert that it lacked notice and an opportunity to be heard. Instead, the gist of MMWEC's takings argument is that it was deprived of property in violation of the Fifth Amendment. This is borne out by the cases MMWEC cites, and MMWEC's focus on the Fifth Amendment implications of the Vermont Supreme Court's action, such as the public purpose and economic impact of that action. *See* Petition at 15-16.

his property without due process of law.''); *Corporation of the Presiding Bishop v. Hodel,* 637 F. Supp. 1398, 1407 (D.D.C. 1986), *aff'd* 830 F.2d 374, *cert. denied,* 108 S.Ct. 1752 (1988) (takings clause is not implicated where a court is adjudicating rights between private parties). A state court resolving a contractual dispute between private parties does not take property. Instead, the court engages in the process of ''analyzing precedent and other rules and declaring the rights of the parties.'' *Hodel,* 637 F.Supp. at 1407.

> Only where the property is taken by a court for the public . . . is the takings clause implicated. It is not implicated where a court is refereeing a title dispute between two private parties. . . Courts do not ''take'', they declare. If they were said to ''take'', they could not effectively declare.

Id. (citations omitted)(quoting Chang, *Unravelling Robinson v. Ariyoshi: Can Courts ''Take'' Property?,* 2 HAWAII L. REV. 57 (1979)).

There was no ''taking'' because the Vermont Supreme Court did not seize private property on behalf of the state. Petitioner even concedes this: ''[t]he action is not an adjustment of benefits and burdens in the common good . . . .'' Petition at 15-16. Instead, the court merely adjudicated and declared the rights of private individuals. Consequently, the Vermont Supreme Court's adjudication of the rights of MMWEC, VEC and the other private parties could not have risen to a taking.

One exception to the rule that a state court adjudicating private contract rights cannot violate the takings clause is where the state court's decision ''constitutes a sudden change in state law, unpredictable in terms of the relevant precedents.'' *Hughes v. Washington,* 389 U.S. 290, 296-98 (1967) (Stewart, J., concurring) (sudden reversal of established precedent ''effected an unforeseeable change'' in state's property law). Even then, the court's action ''must be gross and obvious, coming close to the boundary of ar-

bitrary action." *Roberts v. City of New York,* 295 U.S. 264, 277 (1935) (purported valuation error in condemnation trial did not violate due process). The action of the court below did not approach this standard and the Petition provides this Court with no factual basis or legal analysis, beyond MMWEC's conclusory assertions, for concluding that it did.

Indeed, Vermont has long held that contracts entered into without corporate authority are void *ab initio.* This is reflected in the authority which the Vermont Supreme cites, Petition at 23a, as well as other cases. *See Ives v. Wallingford,* 8 Vt. 224, 230, (1836) (town not liable where contract entered into in excess of statutory authority); *Metropolitan Stock Exchange v. Lyndonville Nat'l Bank,* 76 Vt. 303, 308, 57 A. 101, 102 (1904) (*ultra vires* contracts are void and not merely voidable); *Wing Memorial Hospital Assn. v. Randolph,* 120 Vt. 277, 285-286, 141 A.2d 645, 651 (1957)(contract not *ultra vires* where "made in the performance of the very governmental function entrusted to the overseer as a public official of the town government"). Therefore, there was no unpredictable and sudden change in state law. In any event, any jurisprudential flaws that MMWEC contends may exist in the decision below do not rise to the level of a constitutional violation. *See Hughes,* 389 U.S. at 296-98; *Roberts,* 295 U.S. at 277.

Moreover, MMWEC fails to point to any state action that can be considered a "taking", other than the mere rendering of an adverse decision. Simply put, MMWEC fails to analyze, factually or legally, how the state took private property for a public use. Instead, MMWEC merely sets out this Court's takings standard, then alleges some facts that remotely relate to that standard. The gist of MMWEC's argument is that the decision of the Vermont Supreme Court: (1) was poorly reasoned; (2) had a large economic impact; and, (3) interferes with investors' expectations. Even assuming that MMWEC had provided this Court with a reasoned analysis to support its argument, it still would not be enough. Adjudication of private contract rights will almost always allow the losing party to assert such an argu-

ment. But surely not every adjudication of private contract rights results in a taking.[11]

The cases MMWEC cites in support of its takings claim do not consider whether a state court's adjudication of private rights can result in a taking. All but one of those cases consider the constitutionality of legislative or executive action, not judicial action. Even *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980), MMWEC's only case concerning court action, is inapposite. In *Webb's,* the Court considered whether a state court violated the Fifth Amendment by keeping interest earned on an interpleader fund. *Id.* at 159-160. The Court found that the lower court's action amounted to a transformation of private into public property. *Id.* at 164-65. Because retention of the money had no police power justification, the deprivation constituted a taking. *Id.* at 163-64.

In any event, the record does not support MMWEC's claim that the Vermont judiciary sought to shift a public burden to a private individual. Significantly, the trial court's decision was in MMWEC's favor and was, therefore, hardly an example of state parochialism. Further, contrary to MMWEC's assertion, Petition at 16, the court's opinion has a firm basis in established jurisprudence. The court based its decision, in part, on an interpretation of the statutes which granted Respondents authority to enter into power sales agreements. Petition at 8a. The court also based its decision on deep rooted concepts of non-delegation and avoidance of contracts for lack of authority. Petition at

---

[11]Even if the lower court's action is within the parameters of the takings clause, MMWEC did not possess any property rights capable of being extinguished. The court held that the PSA's were void *ab initio,* meaning, in effect, they never existed. Petition at 23a. Consequently, MMWEC never had any property capable of being taken. This question of property rights is, of course, a matter of state law, demanding deferrence. *Webb's Fabulous Pharmacies, Inc.,* 449 U.S. at 161. It is axiomatic that there can be no taking if the aggrieved party had no property rights capable of being taken.

Petitioner's failure to raise its constitutional defenses below deprived the Vermont courts of an opportunity to adjudicate the foregoing issue of state law in the context of the takings clause. *See supra* note 6 regarding the value of allowing state courts an opportunity to consider constitutional claims.

11a-22a. The court did not consider the benefits that would accrue to Vermonters, other than that "non-enforcement of illegal contracts is a matter of common public interest. . ." Petition at 23a. Further, the mere fact that the court analogized to other jurisdictions' case law hardly impacts the soundness of its decision. An inability to set precedent in reliance upon persuasive authority would forever preclude progression of Vermont's jurisprudence.

B. *The Facially Neutral Decision of the Vermont Supreme Court Neither Discriminates Against nor Impermissably Impacts Upon Interstate Commerce*

The facially neutral decision of the Vermont Supreme Court does not offend the Commerce Clause. *CTS Corporation v. Dynamic Corporation of America,* 107 S.Ct. 1637, 1648-49 (1987) (state's anti-takeover statute restricting voting rights not discriminatory because it regulates without regard to citizenship); *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 471-472 (1981)(statute prohibiting sale of milk in plastic containers not discriminatory despite a detrimental impact on foreign plastic container suppliers); *Exxon Corp. v. Maryland,* 437 U.S. 117, 125-126 (1978). (statute prohibiting gasoline producers or refiners from operating retail service stations not discriminatory despite happenstance that all the gasoline refiners and producers were foreign corporations).

A state law is not discriminatory unless there is proof of either discriminatory intent or discriminatory effect. *Clover Leaf,* 449 U.S. at 471 n.15. Beyond MMWEC's conclusory assertions, there is no basis presented in the Petition for such a conclusion. The Vermont Supreme Court's opinion lacks even a hint of discriminatory intent. The decision is a facially neutral determination of the Vermont rules of municipal and corporate governance. Those rules evenhandedly affect both domestic and foreign interests. The court rendered its decision without regard to the litigants' citizenship and without parochial or protectionist intent.

Moreover, the court's decision has no discriminatory impact on interstate commerce. Foreign corporations may continue to enter into power sales agreements in Vermont, provided that the Vermont municipality or corporation acts within its statutory limits. The lower court's opinion "does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies . . ." *Exxon Corp.* 437 U.S. at 126. Therefore, there is no impermissable barrier to interstate trade.

Petitioner cannot demonstrate the obvious protectionist intent or impact that was clearly present in several of the cases that it cites. *See New Hampshire Power Co. v. New Hampshire,* 455 U.S. 331, 339 (1982) ("The Commission has made clear that its order is designed to gain an economic advantage for New Hampshire citizens at the expense of . . . customers in neighboring states."); *Middle South Energy, Inc. v. Arkansas Public Service Comm'n,* 772 F.2d 404, 416 (8th Cir. 1985)(the commission's "apparent concern, which has been made abundantly plain in its orders and its arguments. . .is the economic impact on Arkansas citizens. . . ."); *American Trucking Ass'n, Inc. v. Scheiner,* 107 S.Ct. 2829, 2841 (1987)(axle tax that imposes a cost on foreign trucks "approximately five times as heavy as the cost per mile borne by local trucks. . .are plainly discriminatory."); *Raymond Motor Transportation, Inc. v. Rice,* 434 U.S. 429, 445 (1978) ("regulations impose a substantial burden on the interstate movement of goods").[12]

Further, the court's decision does not rise to a commerce clause violation because it establishes a rule of municipal and corporate governance that does not risk "subjecting activities to inconsistent regulations. . ." among the states. *CTS,* 107 S.Ct.at 1649. Instead, the decision only regulates the authority of Vermont municipalities and corporations. In *CTS,* the Court rejected the argument that a state's anti-

[12]Petitioner's citation to *Tri-State Generation & Transmission Ass'n v. Public Service Commission,* 412 F.2d 115 (10th Cir. 1969) is curious. In that case, the Tenth Circuit issued an injunction because of the court's long delay and "dereliction." *Id.* at 119 (Murrah, C.J., dissenting).

takeover regulation created an unconstitutional risk of inconsistent regulations: "So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State." *Id.* at 1649. Similarly, because the lower court's decision regulates only the authority of Vermont municipalities and corporations, it does not run afoul of of the *CTS* rule.

Finally, the decision below does not violate the Commerce Clause because it "regulates evenhandedly to effectuate a legitimate local public interest . . . , its effects on interstate commerce are only incidental. . ." and MMWEC cannot demonstrate that "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Northwest Central Pipeline Corp. v. State Corp. Comm'n,* 109 S.Ct. 1262, 1282 (1989)(quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 177, 142 (1970)).

The decision below passes muster under the *Pike* balancing test. As discussed above, the decision regulates evenhandedly. Further, "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations. . . ." *CTS,* 107 S.Ct. at 1649. In addition, any impact the court's decision may have on interstate commerce is merely incidental. The decision merely invalidates a single contract and does not completely banish any commerce from its borders. *See Exxon,* 437 U.S. at 126; *Clover Leaf Creamery,* 449 U.S. at 472-473. Finally, the local benefit strongly outweighs any incidental burden on interstate commerce:

> It is thus an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters. . . .

CTS, 107 S.Ct. at 1651.[13]

To sum, the decision below merely sets forth facially neutral rules for governance of Vermont municipalities and corporations. Vermont has a legitimate interest in setting such rules. Any incidental impingement on interstate commerce fails to rise to the level of "clearly excessive." Therefore, the decision below fully comports with the commerce clause.

Conclusion.

For the reasons set forth above the Court should deny Petitioner's request for a Writ of Certiorari.

Respectfully submitted,

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[13] At least one justice would go even further: "[a]s long as a State's corporation law governs only its own corporations and does not discriminate against out-of-state interests, it should survive this Court's scrutiny under the Commerce Clause, whether it promotes shareholder welfare or industrial stagnation. Beyond that, it is for Congress to prescribe its invalidity." *CTS*, 107 S.Ct. at 1653 (Scalia, J. concurring).

APPENDIX

No. 86-555.
In the Supreme Court
of the State of Vermont

VERMONT DEPARTMENT OF PUBLIC SERVICE, ET. AL.,
PLAINTIFFS-APPELLANTS.

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC CO., ET. AL.,
DEFENDANTS-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT
FOR WASHINGTON COUNTY.

Joint Brief for the Defendants-Appellees.

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A. *Counterclaims, Affirmative Defenses and Related Case.*

The judgment on appeal does not constitute a final judgment in the case, but rather was entered pursuant to V.R.C.P. Rule 54(b), on the claims adjudicated on the cross-motions for summary judgment. The remaining claims, which have not been adjudicated, include the counterclaims of the defendant villages and WEC alleging that they have numerous other power contracts that are substantially the same as those being challenged, and seeking a declaration of validity with respect to all such contracts. Those defendants also asserted a number of affirmative defenses to DPS's claims, including, *inter alia,* waiver, estoppel and res judicata, none of which was decided below. Also, in July 1986, MMWEC brought a separate complaint for declaratory relief against all Vermont participants in its Stony Brook Intermediate Project, including Green Mountain Power Corp. and the Villages of Stowe, Ludlow, Hardwick, Morrisville and Swanton, seeking a determination of the validity of its power sales agreements for that project. *Massachusetts Municipal Wholesale Electric Co.* v. *State of Vermont, et. al.,* Washington Superior Court, Civil Action No., S-301-86 WnC. These contracts (SPC at 616-640) are virtually identical to the contracts challenged in the present case (the principal difference being that power supplied by the Stony Brook Intermediate Project, an oil and natural gas fired generating unit in which MMWEC owns a 90.757 percent interest, is today considered relatively low-cost power). That action is pending in the Superior Court.

B. *Expert Witnesses and Stipulation.*

The cross-motions for summary judgment were heard and determined on a record consisting of an extensive stipulation of facts, together with five volumes of exhibits, and the pre-filed testimony[3] and oral cross-examination of the parties'

[3]Pre-filed testimony was submitted and used by order of the trial court and agreement of the parties.

Statement of Issues.

Since paragraphs 1 through 8 of the DPS's statement of issues (DPS Br. at 18-19) contain incorrect assertions of fact and conclusions of law, the defendants-appellees restate the principal questions presented in more consolidated form:

Under 30 V.S.A. § 4002, as adopted in 1977 by Act 97, expressly authorizing municipal and cooperative electric utilities "to act in participation with other such utilities in arranging for purchase of supplies of capacity and energy from other utilities," within or without Vermont, including "associations of utilities, or public authorities," did the Vermont participants in MMWEC's Project No. 6 have statutory authority in 1979 to contract with MMWEC for a portion of its share of capacity in and energy from a proposed new generating plant?

Do 30 V.S.A. § 604, as amended in 1977 by Acts 275 and 278, applicable to the Village of Lyndonville and the City of Burlington, and 30 V.S.A. §§ 5012 and 5013, applicable to Vermont Public Power Supply Authority, confirm the authority of the municipal and cooperative utilities under § 4002 to contract with MMWEC for a portion of its share of capacity in and energy from a proposed new generating plant?

Did the Project No. 6 PSA's constitute municipal or cooperative indebtedness subject to the provisions of 24 V.S.A. § 1822 or 30 V.S.A. § 108 so that municipal votes or PSB approval, respectively, should have been obtained?

Did the Project No. 6 PSA's constitute a pledge or encumbrance of corporate property subject to the provisions of 30 V.S.A. § 3032 so that votes of the cooperatives' members should have been obtained?

A number of issues raised below by the DPS and other plaintiffs have not been briefed and therefore must be deemed waived.[18] Certain issues that have been briefed by

[18]These include various state and federal constitutional claims as well as the contention that the PSA's conflict with 30 V.S.A. §§ 225-227 authorizing the PSB to regulate electric rates.

the DPS were not reached by the trial court and need not be reached by this Court if it affirms the judgment below.[19] If this Court does not affirm the judgment, the case should be remanded for determination by the trial court of the issues not previously addressed.

Summary of Argument.

The villages and cooperatives were expressly authorized under 30 V.S.A. § 4002 to enter into the Power Sales Agreements for the purchase of capacity and energy in MMWEC's Project No. 6. Section 4002 explicitly authorizes the purchase of capacity in and energy from existing and proposed electrical generating units. The provisions of 30 V.S.A. §§ 604, 5012 and 5013 are consistent with § 4002 in providing to Vermont utilities the flexibility necessary to obtain long term power supplies through take-or-pay contracts. Decisions involving the Washington Public Power Supply System are irrelevant to the proper construction of § 4002. (pp. 22-44).

The villages were not required to obtain voter approval under 24 V.S.A. § 1822 to enter into the Power Sales Agreements with MMWEC.

The Power Sales Agreements do not constitute a pledge, assignment, or hypothecation of the villages' net revenues, nor are they evidences of indebtedness within the meaning of § 1822. Take-or-pay contracts such as the PSA's at issue here are no more "indebtedness" under § 1822 than they are "indebtedness" for purposes of determining compliance with municipal debt limits under 24 V.S.A. § 1762 (pp. 45-60).

The cooperatives were not required to obtain member approval under 30 V.S.A. § 3032 to enter into the Power Sales Agreements for purchase of capacity and energy from MMWEC's Project No. 6 (pp. 60-62). Nor were the cooperatives required to obtain Public Service Board ap-

[19]These include certain affirmative claims of the DPS as well as the affirmative defenses raised by the defendant villages and WEC.

proval under 30 V.S.A. § 108 to enter into the PSA's (pp. 62-65).

and inequitable to permit successor officials now to revise these decisions of their predecessors.

This Court can, and should, decide this case on the grounds relied on by the trial court. Should it decide not to affirm the decision below, however, the Court should remand the case to permit the trial court to rule on the affirmative defenses asserted by the defendant v [sic] Villages and WEC.

The motion for summary judgment filed by the villages and WEC requested that the court enter summary judgment in their favor on their defenses only if the trial court held one or more of the plaintiffs' theories proper and the contracts invalid. (PC at 326). The trial court therefore did not reach consideration of the factual materials and legal arguments advanced by the parties in connection with the defenses raised by the villages and WEC.[40]

While the rules of decision of the Supreme Court indicate that the court may affirm the decision of the trial court on grounds supporting the trial court's decision whether or not they form the basis of the trial court's decision, a trial court will "not. . .be put in error on a point not made below." *Valenti v. Imperial Assurance Co.*, 107 Vt. 65, 71 (1935). In the first instance, the trial court should rule upon whether the facts in evidence in the Summary Judgment Motion do or do not create a genuine issue of material fact and whether the defenses are sufficient as a matter of law. To do otherwise would require the Supreme Court to conduct the detailed factual and legal analysis of the full record which would usually be conducted by the trial court.

[40]If this Court believes that it needs to be ruled upon, the DPS's argument that the Project No. 6 PSA's are invalid for failure to achieve 100% participation (DPS Br. at 92-95) should also be remanded for initial consideration by the trial court.

Supreme Court, U.S.
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No. 88-1769

In The

Supreme Court of the United States

October Term, 1988

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,

Petitioner,

v.

VERMONT DEPARTMENT OF PUBLIC SERVICE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Vermont

---

BRIEF OF VERMONT ELECTRIC COOPERATIVE, INC. IN OPPOSITION TO MOTION OF CONTINENTAL BANK N.A. TO FILE BRIEF AS AMICUS CURIAE AND IN RESPONSE TO BRIEF OF CONTINENTAL BANK N.A. AS AMICUS CURIAE

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Vermont Electric Cooperative, Inc. ("VEC") (Plaintiff below and Respondent herein)[1] opposes the request of Continental Bank N.A., as Bond Fund Trustee, ("Continental Bank") for leave to file its brief as *amicus curiae* in support of petitioner.

---

[1]VEC is the principal member of the Vermont Electric Generation and Transmission Cooperative, Inc.

The Court should deny Continental Bank's motion because it has failed to satisfy the standards set forth in Rule 36 of the Supreme Court Rules. Continental Bank fails to set forth facts or questions of law that have not been presented, or reasons for believing that they will not adequately be presented by the parties as required by Rule 36. Nor, of course, has Continental Bank pointed to the relevancy of any such questions to the disposition of the case.

Continental Bank asserts in its motion that its repayment source may be reduced 20 percent and that other Massachusetts utilities assert that they are excused from making payments

under their power sales agreements. The Petition, however, adequately discusses both of these facts. Petition at 16. The only arguably new assertion Continental Bank presents is the specter of a potential threat to bond market stability for which it presents no evidence bearing on the nearly ten months since the Vermont Supreme Court's decision. Beyond the fact that the bond market effect argument was never specifically raised below, it is difficult to determine how the bank's discussion of bond market stability is distinguishable from the Petition's discussion of economic impact.

In addition to the foregoing and as more fully set forth in the Brief of VEC in Response to Continental Bank's Brief as Amicus Curiae in Support of

Petitioner, Continental Bank's *Amicus* Brief is so riddled with factual and legal inaccuracies that it is not worthy of consideration by this Court. Continental Bank's motion for leave to file a brief as *amicus curiae* in support of petitioner should be denied.

Respectfully submitted,

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---

BRIEF OF VERMONT ELECTRIC COOPERATIVE, INC. IN RESPONSE TO CONTINENTAL BANK N.A.'S BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ARGUMENT

I. CONTINENTAL BANK'S AMICUS BRIEF IS SO RIDDLED WITH FACTUAL AND LEGAL INACCURACIES THAT IT IS NOT WORTHY OF CONSIDERATION BY THIS COURT

Respondent, Vermont Electric Cooperative, Inc. ("VEC") (Plaintiff below and Respondent herein) believes it is obligated to direct the Court's attention to the numerous inaccuracies regarding fact and law riddled throughout the *amicus* brief of Continental Bank N.A., Bond Fund Trustee ("Continental Bank"). Continental Bank's brief reflects a final desperate act to convince the Court to review a case unworthy of further consideration. Unfortunately, that act of desperation strains the bounds of candor and good faith.

A. Continental Bank's Amicus Brief Misrepresents the Record Below

Continental Bank's representation of the proceedings below gives the impression that the Massachusetts Municipal Wholesale Electric Company ("MMWEC") repeatedly and regularly raised its constitutional defenses at every stage of the state court proceedings: "Petitioner also contended that, if the contracts were invalidated under state law, that result would violate the federal Constitution . . . [t]he [Vermont Supreme] [C]ourt simply ignored the constitutional provisions upon which petitioner relied. . . " *Amicus* Brief at 3-4. Continental Bank however, fails to explain that MMWEC never raised its constitutional defenses, after it mentioned those

defenses in the initial pleadings, until its brief before the Vermont Supreme Court on its motion to reargue. As explained in VEC's Brief in Opposition at 18, that was too late. More egregious is Continental Bank's unsubstantiated claim that the trial court proceedings "deferred the affirmative federal defenses to a later stage. . ." *Amicus* at 5. There is no basis for this claim in the record. *See e.g.*, Petition at 82a-84a. (Trial Court's full discussion of "Constitutional Violations" without mention of MMWEC's constitutional defenses). Nonetheless, Continental Bank attempts to support this careless contention by quoting language from Petitioner's brief on appeal completely out of context. Continental Bank's

quotation of a passage from MMWEC's brief and its unexplained and unidentified omission of a significant footnote contained in that passage constitute a blatant misrepresentation to this Court of the record below. *See* Brief of VEC in Opposition at 3a-4a (relevant text in full). That misrepresentation was hardly an oversight. A reading of the full relevant text makes it clear that not only did MMWEC fail to preserve its constitutional defenses, but it went even further to affirmatively waive them. Brief in Opposition at 15.

B. Continental Bank's Brief Amicus Mischaracterizes "Violation of Due Process":

The Vermont Supreme Court did not deny MMWEC of its right to procedural due process. MMWEC had an opportunity

to have its constitutional defenses heard, but instead waived those defenses. See VEC Brief in Opposition at 18. It is MMWEC's ample opportunity to raise its defenses, that distinguishes this case from *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), upon which Continental Bank relies. In *Logan*, the state court held the failure of a state agency to convene a factfinding conference within the statutory timeframe precluded the Plaintiff's claim, although the Plaintiff did all it could to obtain a timely conference. *Id.* at 426-428. This Court held that the Plaintiff was deprived of a meaningful opportunity to present his claim. *Id.* at 437. Unlike the Plaintiff in *Logan*, MMWEC did have a reasonable opportunity to present its

defenses in its brief before the Vermont Supreme Court. By failing to brief those defenses, however, MMWEC waived them. *See* V.R.A.P. Rule 40; VEC Brief in Opposition at 18. "The State may erect reasonable procedural requirements for triggering the right to an adjudication. . . .And the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan*, 455 U.S. at 437.

Continental Bank curiously cites to the Supremacy Clause in support of its due process argument. Discussion of the Supremacy Clause is unnecessary. It cannot be disputed that the Fourteenth Ammendment's due process standards apply to state action. Further, this case does not

involve a situation where a state court expressly refused to enforce a federal statute on the unfounded assertion that a state need not enforce foreign laws, *Testa v. Katt*, 330 U.S. 386, 388 (1947), or a properly presented question regarding the constitutionality of federal statutes, *FERC v. Mississippi*, 456 U.S. 742, 752 (1982).

Indeed, a perusal of Continental Bank's cited Supremacy Clause cases reveals that it did little more than read marginally helpful *dicta*, while ignoring holdings, supporting principles and whether the cases are genuinely supportive. For example, in *Duckworth v. Serrano*, 454 U.S. 1, 3-5 (1981), this Court held that, because a state habeas corpus petitioner failed

to raise the issue before the state courts, she waived her right to argue that she had been deprived of her Sixth Amendment rights. This parallels VEC's argument that MMWEC similarly waived its constitutional defenses. Thus, *Duckworth* demonstrates that this court should deny the writ.

Further, at least once Continental Bank effectively misrepresents the Court's holdings by improperly editing the Court's language. For example, in *Jackson v. Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731, 731-32 (1967), this Court reversed a state court decision because the Plaintiff's admiralty negligence claim was not, preempted by a federal statute as the state court ruled. This Court noted in *dictum*, "In this

situation it is the duty of the Louisiana courts to adjudicate this case." *Id.* at 735. Of course, by "this case," the Court referred to the Plaintiff's negligence claim, not to federal statutory or constitutional claims. Continental Bank, however, misquoted this language, improperly altering its meaning: "it is the duty of the [state] courts to adjudicate [federal claims]." *Amicus* at 5. This Court should not condone such inaccuracy in an *amicus* brief.

Finally, Continental Bank's citation to *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 282 (1932) is inapposite. *Lawrence* does not consider whether a state court litigant, which failed to assert its federal claims until its motion to reargue, properly

asserted those claims below. Instead, *Lawrence* explains that the state court's jurisdiction "was rightly invoked." *Id.*

C. The Constitution Does Not Prohibit Retroactive Application of the Vermont Supreme Court's Decision

Continental Bank argues that MMWEC presents a substantial constitutional question because retroactive application of the Vermont Supreme Court's decision may adversely effect the bond market. However, Continental Bank tries to raise this stale and selfserving assertion with no evidence to support it. Continental cannot hang a constitutional claim on the hook of unsubstantiated hindsight. Continental Bank's citations in support of this notion are misplaced. In both *City of Phoenix v. Kolodziejski*, 399

U.S. 204 (1970) and *Cipriano v. Houma*, 395 U.S. 701 (1969), this Court held that restricting the voting franchise on municipal general obligation and municipal revenue bonds, respectively, to property taxpayers violated the Constitution. *Id.* at 706 (*citing Carrington v. Rash*, 380 U.S. 89 (1965)), *Kolodziejski*, 399 U.S. at 213. This Court limited the retroactivity of its decision because its decision would have national impact. *See Cipriano*, 395 U.S. at 706, *Kolodziejski*, 399 U.S. at 214-215. A denial of MMWEC's petition, however, will hardly have national impact. Instead, denial of the writ will merely leave one state's decision intact. Denial of the writ will not foreclose the possibility that this Court will

later review similar, but better preserved issues from litigation originating in another state.[1]

D. Vacating the Judgment Below Would Cause Respondents to Suffer Substantial Undue Prejudice

Continental Bank claims that a summary vacation of the judgment below and a remand to the state courts would not prejudice any legitimate interest of respondents. *Amicus* at 9. "Rather, they simply would have to litigate the federal defenses that petitioner raised as early as its answer to the complaint." *Id.* Continental Bank

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[1]This case does not present a situation where retroactive application of a rule of procedure would deprive a litigant of his day in court, as in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 108 (1971). Instead, MMWEC deprived itself of its day in court by waiving its constitutional defenses below.

neglects to mention that (a) MMWEC failed to so much as mention those defenses after its initial pleadings, until its motion to reargue before the Vermont Supreme Court, and (b) MMWEC went even further to waive those defenses. Respondents were entitled to rely upon MMWEC's waiver; vacating the judgment below would penalize that reliance by forcing Respondents again to incur the expense and uncertainty of litigation.

CONCLUSION

Continental Bank's repeated factual and legal inaccuracies demonstrate a lack of candor before the Court. At a minimum, the Court should disregard Continental Bank's brief. In any event, Continental Bank presents no relevant facts or law not already

discussed in the Petition and VEC's opposition. Thus, for the reasons discussed above, and the reasons discussed in VEC's Brief in Opposition, VEC respectfully requests that the Court deny the Writ.

Respectfully submitted,

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No. 88-1769

In The

Supreme Court of the United States

October Term, 1988

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,

Petitioner,

v.

VERMONT DEPARTMENT OF PUBLIC SERVICE, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Vermont

SUPPLEMENTAL BRIEF OF THE VERMONT DEPARTMENT OF PUBLIC SERVICE

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SUPPLEMENTAL BRIEF OF THE VERMONT DEPARTMENT OF PUBLIC SERVICE

Respondent Vermont Department of Public Service ("VDPS") submits this supplemental brief under Supreme Court Rule 22.6. This supplemental brief addresses points raised in the brief amicus curiae of Continental Bank N.A. filed July 10, 1989 in support of the petition ("Amicus Brief").[1] For the most part, VDPS joins in the arguments by Vermont Electric Cooperative, Inc. ("VEC") in its Brief in Response to the Amicus Brief dated July 20, 1989.[2] The Amicus Brief contains so many incorrect and misleading statements,

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[1]A supplemental brief is appropriate because the Amicus Brief is "intervening matter not available at the time of [VDPS'] last filing." Rule 22.6. Ordinarily, under Rule 36.1, an amicus brief in support of certiorari would be filed within the time allowed for the petition itself, so that respondents have an opportunity to address it. VDPS did not have an opportunity because the Amicus Brief was filed on the same day as VDPS' brief in opposition (July 10, 1989).

[2]VEC's Brief may also be considered a supplemental brief under Rule 22.6 for the reason given in note 1 above.

that it should not pass unchallenged.

ARGUMENT

1. The Amicus Brief Misrepresents The Proceedings Below.

Continental Bank's argument that MMWEC was denied due process rests on a false assumption. It is not true that MMWEC timely and properly "contended that the invalidation of the contracts would violate the federal constitution." Amicus Brief at 3. The Bank does not substantiate this assumption with citations to the record, but merely repeats MMWEC's unfounded assertions in the matter. In reality, MMWEC wholly failed to adequately present constitutional arguments below. MMWEC's failure belies any protest now that it was denied an opportunity to try its cause. Moreover, MMWEC's neglect to present its federal issues below, as reasonably required by Vermont procedure, disqualifies its petition for review under 28 U.S.C. § 1257(a). VDPS Brief In

Opposition at 9-14.

VDPS has carefully detailed the specifics of MMWEC's arguments at each stage of the proceedings below in VPDS Brief in Opposition at 4-14.

- In its answer, MMWEC simply did not plead any affirmative defense that invalidation of the PSAs would violate the Constitution. The Court will see, upon reading the eighth through fourteenth affirmative defenses, that MMWEC merely accused VDPS of unconstitutional action "by prosecution of the present litigation." Petitioner's App. 57a-58a; VDPS Brief In Opposition at 5-6, 10.

- In litigating the cross-motions for summary judgment, MMWEC made no mention, adduced no evidence, and cited no law, concerning constitutional defenses. Continental Bank's pat statement (Amicus Brief at 3) that the parties limited summary judgment to state law issues is cut from whole cloth. The Bank cites no substantiation whatsoever for this falsehood. That no such limitation existed is proved by the facts that the parties argued, and the trial court decided, issues raised by VDPS under the Vermont and federal constitutions. VDPS Brief In Opposition at 5, 6 n.3 & 11.

Similarly, Continental Bank cites nothing in the record for its remarkable assertion that "the trial court proceedings...deferred the affirmative defenses to a later stage." Amicus Brief at 5. This statement is a fiction. The Court will search in vain though the decision of the Superior Court (reprinted at Petitioner's App. 65a-85a) for anything even remotely suggestive of it.

On appeal, MMWEC was mum on constitutional issues. See VDPS Brief In Opposition at 6-7. Continental Bank asserts that MMWEC requested the Vermont Supreme Court to remand for determination of constitutional issues. Amicus Brief at 5, quoting MMWEC's Appellate Brief at 21. This argument rests on a snippet of MMWEC's appellate brief excised from context. The full text of the pertinent passage asked remand on other issues raised by other parties, and nowhere so much as mentioned any constitutional argument by MMWEC.[3]

[3]The full text is reproduced in the briefs of VDPS and VEC at 7 and 3a-4a, respectively. MMWEC, as petitioner, must "affirmatively show" that it presented a federal question not passed upon by the state court. Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550 (1987). MMWEC's petition, however, does not quote or cite this or any passage from its appellate brief below.

The full text of MMWEC's briefing on affirmative defenses is discussed in VDPS Brief In Opposition at 7, and 12-13.

- Continental Bank compounds this distortion by implying that MMWEC's motion for reargument alerted the Vermont court that failure to consider the new constitutional arguments was a due process "error." Amicus Brief at 5. In reality, neither MMWEC's appellate brief, nor its motion for reargument, nor its supporting memorandum, so much as hint that failure to address the constitutional arguments would violate due process. That argument first emerged in the petition here.

The motion for reargument, for the first time below, created arguments under the Commerce and Takings clauses. It mentioned the Due Process Clause only in respect to the doctrine of incorporation. As explained in VDPS Brief In Opposition at 13-14, this was neither proper nor timely.

2. The Vermont Court Properly Handled MMWEC's Appeal.

The Amicus Brief is devised to excite the misimpression of a due process outrage.[4] By repeated use of charged words such as "failure", "ignored", "refused", "pretermitted" and the like (Amicus Brief at 2-6 passim), Continental Bank implies that the Vermont court obstinately disregarded a constitutional argument presented to it for decision. One could just as well say that the Vermont courts "failed to consider" and "ignored" a host of other arguments that MMWEC did not make. In reality, the Vermont courts had no occasion to consider MMWEC's constitutional arguments because MMWEC presented none until seeking reargument after appeal. Even then, MMWEC did not

[4]There is high irony that Continental Bank, protesting that MMWEC was denied its day in court below, would have the Court summarily vacate the judgment without briefing or argument by respondents. Amicus Brief at 8-9.

urge that due process required consideration of its arguments. If that constitutes a denial of due process, then litigants could "sandbag" lower courts by omitting some issue, however farfetched, and later taking exception to the "failure" to consider it. It is basic that our courts do not allow such shenanigans; both Vermont and federal procedures reasonably require that a litigant timely present, pursue, and preserve its arguments for orderly consideration. See VDPS Brief In Opposition at 10-12. Litigants sacrifice arguments--sometimes by mistake and often by design--in almost every case, and there is no denial of due process in it.

Finally, Continental Bank turns in a false alarm by repeatedly charging that the Vermont court gave no reason for denying reargument. Amicus Brief at 4-6. This charge implies that the Vermont court acted in an unreasoned, even petulant, manner,

and it is flat out wrong. The Entry Order denies reargument squarely under V.R.A.P. 40, which is an adequate and independent state ground for the result. VDPS Brief In Opposition at 14-15. This Court has repeatedly denied review of almost identical state decisions which simply refused reargument to raise new constitutional issues. Prudential Fed. Sav. & Loan Ass'n. v. Flanigan, 478 U.S. 1711 (Rehnquist, Circuit Justice 1986)("court denied petition for rehearing without comment"); Estate of Wilson v. Aiken Indus., Inc., 439 U.S. 877, 879 (1978)(Blackmun, J., concurring in denial of certiorari)("Pennsylvania court denied reargument without explanatory comment"); McGarrity v. Delaware River Bridge Comm'n, 292 U.S. 19, 20 (1934)("No Federal question was raised prior to a petition for rehearing in the Supreme Court of the State, which was denied without more.")

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Vermont should be denied.

Respectfully submitted,

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